

UNITED STATES DEPARTMENT OF AGRICULTURE

# AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

UNDER THE

REGULATORY LAWS ADMINISTERED IN THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(including Court Decisions)



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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE  
PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agriculture Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Poultry Products Inspection Act, (21 U.S.C. 451 *et seq.*), and The Virus-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions." They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150 Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

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**POULTRY PRODUCTS INSPECTION ACT****ICULTURE DECISIONS**

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(No. 22,325)

*In re* ANTONIO ALENTADO. AWA Docket No. 219. Decided February 23, 1983.

Standards and regulations—Transportation of live animals—Civil penalty—Consent

Respondent consented to an order to cease and desist from failing to comply with the standards and regulations under the Act concerning the transportation of live animals. Respondent is assessed a civil penalty of \$250.00

*Gregory Cooper*, for complainant.

Respondent, *pro se*.

*Decision by John G. Liebert, Administrative Law Judge.*

CONSENT DECISION

This is a proceeding under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), hereinafter referred to as the Act, and the regulations and standards issued pursuant to the Act. It was instituted by a complaint filed on November 12, 1982, by the Acting Administrator, Animal and Plant Health Inspection Service, pursuant to the Act and the applicable Rules of Practice (7 CFR 1.133 (b) (1)). This decision is entered pursuant to the consent decision provision of the Rules of Practice (7 CFR 1.138).

The respondent specifically admits the jurisdictional allegations of the complaint, but neither admits nor denies the remaining allegations of the complaint. The respondent waives the right to a hearing and any further procedures in this matter. The parties consent to the issuance of this decision for the purpose of settling this proceeding.

FINDINGS OF FACT

1. Antonio Alentado, hereinafter referred to as the respondent, is an individual whose address is 9564 S.W. 58 Street, Miami, Florida 33173.

2. Respondent is now, and at all times material herein was, a licensed dealer within the meaning of sections 2 and 3 of the Act (7 U.S.C. 2132 and 2133).

CONCLUSIONS

Inasmuch as the respondent has admitted the jurisdictional allegations of the complaint and the parties have agreed to the provisions set forth in the following Order in disposition of this proceeding, such Order will be issued.

ORDER

Respondent, his agents and employees, directly or indirectly, through any corporate or other device, shall cease and desist from failing to comply with the regulations and standards under the Act concerning the transportation of live animals.

Respondent is assessed a civil penalty of \$250 which shall be paid by certified check or money order made to the order of the Treasurer of the United States and which shall be forwarded to Gregory Cooper, Office of the General Counsel, United States Department of Agriculture, Room 2014, South Building, Washington, D.C. 20250, within thirty (30) days from the date that this Order becomes effective.

This decision shall have the same force and effect as a decision entered after a full hearing and shall be effective upon service on the respondent.

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(No. 22,326)

*In re* HENRY DOORLY ZOO. AWA Docket No. 217. Decided February 23, 1983.

**Standards and regulations—Transportation of regulated animals—Consent**

Respondent consented to an order to cease and desist from violating the Act and the standards and regulations issued thereunder, and in particular, shall comply with all the standards in the transportation of regulated animals.

*Patricia V. Fettmann*, for complainant.

Respondent, *pro se*

*Decision by John A. Campbell, Administrative Law Judge.*

**STIPULATION AND CONSENT DECISION**

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. §§2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, charging that respondent willfully violated the Act and the regulations and standards issued thereunder (9 CFR Parts 1, 2 and 3). This decision is entered pursuant to the Consent Decision provisions of the Rules of Practice applicable to these proceedings (9 CFR 4.2; 42 FR 10959; and 7 CFR 1.138; 42 FR 745).

The respondent admits the jurisdictional allegations contained in paragraph 1 of the complaint, specifically admits that the Secretary has jurisdiction in this matter, neither admits or denies the remaining alle-

gations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

Respondent further agrees that it will make a concerted effort to educate its employees in the Animals Welfare Act and the regulations and standards issued thereunder and will take all necessary affirmative action to comply fully with the Act and the regulation in its future handling and transportation of live animals.

In consideration of the above, complainant agrees to the entry of this decision.

#### FINDINGS OF FACT

1. The Henry Doorly Zoo, hereinafter referred to as respondent, is owned by the city of Omaha and operated by the Zoological Society.

2. Respondent's mailing address is Riverview Park, Omaha, Nebraska 68107 and list its officers as;

Lee G. Simmons: Director

Lyndsay Philips, Jr.: Veterinarian

Randal W. Rockwell: General Curator

3. Respondent is a Class C exhibitor which, at the time of licensing, was informed of the provisions of the Act and the regulations and standards issued thereunder.

4. On September 23, 1982, a complaint was filed by the Administrator, Animal and Plant Health Inspection Service, alleging violation of the Act and section 3.113 of the standards issued thereunder (9 CFR §3 3113).

#### CONCLUSION

The respondent, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

#### ORDER

Respondent Henry Doorly Zoo shall comply with each and every provision of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*) and the standards and regulations promulgated thereunder (9 CFR, Parts 1, 2 and 3) and shall cease and desist from any violation thereof and, in particular, shall comply with all the standards in the transportation of regulated animals.

This decision shall have the same force and effect as if issued after full hearing and shall be effective on the day upon which service of this order is made upon respondent.

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(No. 22,327)

*In re* MILLSAP PACKING COMPANY. FMIA Docket No. 63. Decided February 23, 1983.

**Withdrawal and denial of inspection services—Consent**

Respondent consented to an order indefinitely withdrawing and denying its inspection service

*Kris H. Ikejiri*, for complainant

*Mark Cambiano*, Morrilton, Ark, for respondent.

*Decision by Victor W. Palmer, Administrative Law Judge.*

**STIPULATION AND CONSENT DECISION**

This is a proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §601 *et seq.*) hereinafter referred to as the FMIA, and the applicable Rules of Practice (9 CFR 335.1 *et seq.*) to withdraw federal meat inspection service from the Millsap Packing Company, hereinafter referred to as respondent. This proceeding was commenced by a complaint filed by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the administration of the FMIA. The parties have agreed that this proceeding should be terminated by entry of the consent decision set forth below and have agreed to the following stipulations:

1. For the purposes of this stipulation and the provisions of this Consent Decision, respondent admits all of the jurisdictional allegations of the complaint, admits the Findings of Fact, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law, or discretion, as well as the reasons or bases thereof, and

(c) All rights to seek judicial review and otherwise challenge or contest the validity of this decision.

2. The respondent waives any action against the United States Department of Agriculture under the Equal Access to Justice Act of 1980 (5 U.S.C. §504 *et seq.*) for fees and other expenses incurred by respondent in connection with this proceeding.

**FINDINGS OF FACT**

1. Respondent, at all times material, was a company which operated a meat packing establishment in Morrilton, Arkansas, and was a recipient



of inspection services under Title I of the FMIA. The respondent's mailing address is Route 1, Morrilton, Arkansas, 72110.

2. Robert "Bobby" Millsap, at all times material, was the owner of, and responsibly connected with, the Millsap Packing Company.

3. On or about July 13, 1982, in the United States District Court for the Eastern District of Arkansas, the respondent and Robert "Bobby" Millsap were each convicted of two misdemeanors. One for the preparing of two cattle without complying with the inspection requirements of the FMIA, in violation of 21 U.S.C. §§606, 610 (a), and 676 (a). The second for using, without authorization from the Secretary of the USDA, a simulation of an official device on the carcasses of two cattle, in violation of 21 U.S.C. §§661 (b) (2), 661 (c), and 676 (a).

### CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following order and consent decision in disposition of this proceeding, such decision will be issued.

### ORDER

1. Inspection services under Title I of the FMIA are indefinitely withdrawn from and denied to respondent, its owners, officers, directors, successors, affiliates or assigns, directly or through any corporate or other device, except that this order shall not apply to any person who, or firm or corporation which, purchases the establishment, facilities and/or business of the respondent, for so long as such person, firm, or corporation:

(a) does not employ or add in any capacity, any individual who has been responsibly connected with, as that term is defined under section 401 of the FMIA (21 U.S.C. §671), the respondent; and

(b) does not knowingly employ or add in any capacity, any individual who has been convicted, in any federal or state court, of any felony, or more than one violation of any law, other than a felony, based upon the acquiring, handling or distributing of unwholesome, mislabeled, or deceptively packaged food, or fraud in connection with transactions in food, and immediately terminates its connection with any such individual when that individual's conviction becomes known.

2 This Order and Consent Decision will become effective on May 20, 1983

(No. 22,328)

*In re* BILLY GRAY and MRS. C. RAY CARTER. HPA Docket No. 124. Decided December 29, 1982.

**Action dismissed on the merits**

Where the charges in the complaint are not supported by the probative evidence presented, the action is dismissed.

*Ronald K. Silver*, for complainant

*Dan P. Whitaker*, Lewisburg, Tenn., for respondents.

*Decision by John G. Liebert, Administrative Law Judge.*

**DECISION ON REMAND**

This matter is before us on a remand from the Judicial Officer on appeal from our initial decision for the following reasons:

A) The Judicial Officer reversed the finding of the Administrative Law Judge on the point that the horse was not shown, within the meaning of the term as used in the statute. Since this is a question of interpretation of the statute as to what constitutes a "showing", we perforce accede to the interpretation of the term as outlined by the Judicial Officer and will be guided accordingly. Because of our interpretation of this term, which was reversed, we did not specifically make other findings which are now necessitated to complete our disposition of the matter.

B) Basically the findings necessitated are:

- 1) was the horse "sore" within the meaning of the statute?; and
- 2) was the horse shown with a prohibited substance on his pasterns in violation of the pertinent regulations?

In making these additional findings and conclusions we are admonished to consider several guidelines among which are those established by the Judicial Officer's ruling in *In re Rowland* (H.P.A. Doc. # 107, decided Dec. 9, 1981.) 40 A.D. 1934.

In accordance with the remand we undertake a re-write of our decision omitting those portions of the findings and conclusions which appear to be objectionable to the Judicial Officer and making additional findings as appear to be necessary in the light of the remand and express guidelines contained therein.

This is a proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. 1821 *et seq.*), hereinafter referred to as the "Act." It was initiated by a complaint filed on June 25, 1979, by the Administrator of the Animal and Plant Health Inspection Service of the United States Department of Agriculture, alleging that respondents violated

the Act by entering, and showing a "sored" horse in the September 3 showing of the 1977 Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee. Respondents filed their respective answers on July 17, 1979. The complainant then filed an amended complaint on January 21, 1980, by adding a further allegation that the respondents violated section 11.2 (d) of the Regulations (9 C.F.R. 11.2 (d) ) by showing the horse while its front pasterns were covered with a "black foreign substance." Respondents filed separate answers to the amended complaint, in effect, denying the alleged violations.

Oral Hearing on the matter was held in Lewisburg, Tennessee before Administrative Law Judge John G. Liebert on April 15 and 16, 1980. Respondents are represented by Dan P. Whitaker, Esq., and Stephen S. Bowden, Esq., of Lewisburg, Tennessee, and complainant is represented by Ronald K. Silver, Esq., Office of the General Counsel, U.S.D.A., Washington, D.C. At the conclusion of the hearing the parties were given the opportunity to file proposed findings of fact and briefs.

By agreement of the parties the deposition of Dewitt Owen, D.V.M., was taken in Franklin, Tennessee, on May 23, 1980, and submitted into evidence as Exhibit #8 with the consent of the Administrative Law Judge at the hearing.

At the hearing the parties stipulated that respondent Billy Gray, at all times material herein, was the trainer of the horse known as "Scatman's Tom Cat," and that respondent, Mrs. C. Ray Carter, at all times material herein, was the owner of the horse. Respondents further stipulated that on September 3, 1977, respondents entered, for the purpose of showing and exhibiting, "Scatman's Tom Cat" in the 1977 Tennessee Walking Horse National Celebration, as entry No. 1336 in Class No. 71.

#### *Pertinent Statutory Provisions*

#### *15 U.S.C. § 1821 (3)*

The term "sore" when used to describe a horse means that—

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

as a result of such application, infliction, injection, use, or practice, a horse suffers, or can reasonably be expected to suffer, physical pain, distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was

S.C. § 1824 (2) (7)

the following conduct is prohibited:

★ ★ ★ ★ ★ ★ ★

- (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.
- (7) The showing or exhibiting at a horse show—any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 9 prohibits to prevent the soring of horses.

S.C. § 1825 (b) (1), (c), (d) (5)

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- (b) (1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The

amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

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- (c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this Act or any regulation issued under this Act may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than 5 years for any subsequent violation.

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- (d) (5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs

*Pertinent Regulations*

(in effect on September 3, 1977)

1.F.R. 11.2. Prohibitions concerning exhibitors.

"(d) All substances are prohibited on the extremities, above the hoof (but below the fetlock)

of any horse while being shown or exhibited at any horse show or exhibition, except glycerine, petrolatum, and mineral oil, or mixtures thereof: Provided, That:

(1) Show management agrees to furnish and maintains control over all lubricants for use at the horse show or exhibition;

(2) Any such lubricant is applied after the horse is inspected by the show manager or his representative and the lubricant is applied under the supervision of show management.

(3) Show management makes such lubricants available for Department personnel to obtain samples for laboratory analysis.

(37 FR 2427, Feb. 1, 1972, as amended at 40 FR 36553, Aug. 21, 1975)"

#### FINDINGS OF FACT

1. Respondent Billy Gray is an individual whose mailing address is Route 1, Belfast, Tennessee 37109. At all times material herein he was the trainer of the Tennessee Walking horse known as "Scatman's Tom Cat." He is well-known and established horse trainer and exhibitor, operating the largest training barn in middle Tennessee. This barn is located approximately 23 miles from Shelbyville, Tennessee. He has been in the business for over thirteen years. At the Celebration in 1977 he had thirty-three entries.

2. Respondent Mrs. C. Ray Carter is an individual residing in Murfreesboro, Tennessee. At all times material herein she was the owner of Scatman's Tom Cat. She is a sportswoman, not a horse trainer or breeder, and has participated in numerous shows each year spanning many years.

3. Scatman's Tom Cat was purchased for Mrs. Carter by her husband in the fall of 1972 when the horse was approximately three years old. At the time of purchase this horse was known to have a medical condition known as founder in both front feet. From 1972 until 1977 this horse was shown by Mrs. Carter at numerous horse shows and it won several blue ribbons. It won a 5'th place ribbon in its Class at the Celebration in 1976. It was the customary procedure for the U.S.D.A. Veterinarians at shows where they were in attendance to examine a horse after it won a blue ribbon. Since Mrs. Carter owned the horse, Scatman's Tom Cat has been examined at the Celebration each year commencing in 1973 by

U.S.D.A. Veterinarians. None of these examinations, including examinations by thermovision, found the horse to have been sore.

Prior to September 3, 1977, the horse was shown at about a dozen small shows in 1977. It won several blue ribbons, but U.S.D.A. examiners were not in attendance at any of these shows. However, at each of these shows the horse was examined by a Show Steward in accordance with the Act and the Regulations.

Because of the known founder condition Mrs. Carter testified that the horse was never worked out or shown on a hard surface track.

4. Scatman's Tom Cat was turned over to respondent Billy Gray for training in April, 1977. At the time the horse was turned over to Mr. Gray he knew that it had a founder problem and that it did have callosities on its forelegs. He testified that, because of the founder problem, he always worked the horse out on a soft area, and that the horse was never shown on a hard surface track, because he did not want to aggravate the founder condition and lame the horse. Normally he worked his horses every day, but because of the founder problem of Scatman's Tom Cat and the considerable amount of showing of the horse prior to the Celebration, he worked the horse only every other day.

5. On September 3, 1977, Scatman's Tom Cat was entry No. 1336 in Class No. 71 in the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee. This was an Amateur Class. A few minutes prior to the commencement of the Class No. 71 competition the horse was inspected by the Show Steward, Mr. Gaines, since deceased. After the Steward examined and passed the horse as not being sore, respondent Gray, as was the procedure, rode it in front of Dr. Nathan Thompson, the Show Veterinarian. He performed the required "Figure 8" movements with the horse, and Dr. Thompson inspected and passed the horse as fit for showing, i.e., not sore. Respondent Gray testified that, in his opinion, the horse exhibited no unusual characteristics at the time. He then turned over the horse to Mrs. Carter, who got on the horse, warmed the horse up to suit her, and waited for her call into the show ring. No evidence was adduced that anything unusual happened to the horse in the holding area.

6. Dr. E. E. Everson was assigned as one of a team of five U.S.D.A. Veterinarians to cover the Celebration Show on the evening of September 3, 1977. His duty was to observe the horses as they entered the ring to note any that appeared to have the characteristics of a sore horse, and to call those that did to the attention of his associate veterinarians for an examination. The focal point for his observation was the ramp which sloped from the holding area down to the show ring. This observation point was selected because as the horses came down the ramp more weight would be put on the front feet, thus accentuating any soreness.

which might be present in the forelegs which would cause the animal to react in an abnormal manner which it probably would if it was sore. When Dr. Everson observed Scatman's Tom Cat as it was coming down the ramp he noted that the horse exhibited pain in the front feet as evidenced by a reluctance to put its forelimbs to the ground. His observation of the horse was for a period of less than one minute. He conducted no examination of the horse, but, as an expert, testified that the horse had shown the characteristics of a sore horse. On cross-examination, however, he stated that a horse with abscesses or tendonitis would exhibit the same characteristics.

7. The evidence discloses that, following a recent rain, the enclosure area outside the show ring was muddy and generally soft. The surface of the down-grade ramp into the show ring was composed of large stone gravel and was very hard, particularly so in comparison to the surface of the enclosure area. To remove the muddy surface and loose earth from the ring itself which had been caused by the recent rain it had been scraped down to the hard surface.

8. Mrs. Carter testified that as she rode the horse down the ramp it suddenly hesitated and then just stopped. This was totally out of character for the horse and was a deviation from his usual performance. She sensed something was wrong. She believed this reaction to be due to the sudden change of surfaces and the impact on the horse's forefeet of striking the hard surface of the ramp after coming from a soft one. She got the horse to move into the ring and after much coaxing finally had it make a short turn at the bottom of the ring. Then it stopped again. At this point she sensed that something was seriously wrong with the horse. *She immediately requested permission to withdraw the horse from the Show.* This permission was granted. She dismounted, walked the horse out of the ring and turned it over to Mr. Gray. She then re-joined her husband to watch the remainder of the Show. She had been in the ring only a very short time, a minute or so.

9. Dr. Bob C. Thompson was one of the team of U.S.D.A. Veterinarians assigned to cover the Show on September 3, 1977. His specific task was to observe the action of the horses in the show ring to see if any exhibited the characteristics of a sore horse and to report these for examination by his associates. He sat in a box on the northwest corner of the ring. Dr. Thompson testified that as Scatman's Tom Cat came into the ring he didn't move as a normal horse should, because the horse had the characteristics of a horse with painful sore feet. The horse was reluctant to move at all. He did not see the horse before it entered the ring, but noted that the horse was excused from completion of the showing at the request of the rider.



10. Dr. L. S. Critchfield and Dr. Robert Leech were the two U.S.D.A. Veterinarians assigned to the Show to conduct the physical examination of horses selected for examination by Drs. Thompson and Everson. Neither of them specifically recalled the examination of Scatman's Tom Cat. However, they made separate affidavits within a few days after the examination describing their actions and conclusions. These affidavits were received as Exhibit #3 and Exhibit #4, respectively. The substance of these affidavits was that the horse had a large amount of scar and granular tissue on the posterior and anterior surfaces of both front pasterns, and on palpation both found areas of sensitivity in the center of the area of granular tissue on the anterior surfaces of both pasterns. These areas were described as ridges of granular tissue approximately one inch wide and two inches long located about one inch above the coronary band. On palpation of these areas the horse flinched and otherwise indicated acute sensitivity to the pressure of palpation. Both noted that the horse appeared to be in pain and tried to shift its weight to its hind limbs as much as possible.

Both of the examining veterinarians' affidavits stated that the particular areas of sensitivity noted were located where action chains would strike, thus aggravating the over-sensitive granular tissue, which had been built up over a long period of time by what they concluded to be the result of excessive chain action and other devices.

Dr. Critchfield's affidavit concluded that, in his professional opinion, the granular tissue noted was caused by excessive use of chains or action devices. In addition to his affidavit, Dr. Critchfield executed Form 19-7, (Exhibit #2), "Summary of Alleged Violation." The information on this Form does not vary materially from his affidavit.

Dr. Leech's affidavit concluded that, in his professional opinion, the horse had been sored both chemically and mechanically off and on during its entire training life. He further concluded that:

*"The soring evident at the time of my examination was caused by mechanical abuse of the chains on the pasterns of the horse while being shown in the class immediately preceding my examination."*

Dr. Leech did not sign the Form 19-7, which was intended to be the record made at the time of the examination by the examining veterinarians.

Both of the examining veterinarians concluded that Scatman's Tom Cat was sored as defined in the Horse Protection Act. This conclusion is based upon their examination of the horse as recorded in Exhibits #2, #3, and #4. This examination, according to their affidavits, consisted of (a) observing the stance of the animal, which exhibited great pain in the forelimbs from supporting the weight of its body; (b) observing the pres-

ence of granular and scar tissue; and (c) noting the reaction of the animal to palpation of the anterior granular area on each pastern.

Form 19-7 does not disclose (in Items 21 and 22), nor do the affidavits of the examining veterinarians state, any additional symptoms of present soreness which usually accompany such a condition. These are usually expressed as open or reddened running lesions, cracked surface of tissue, broken or reddened skin, or other indications of recently abused or abraded body tissue. Their conclusions that the horse was sore was based upon the sensitivity as found and the existence of large amounts of granular or scar tissue. As more particularly described by Dr. Leech, the horse was made sensitive by excessive workouts in chains over its working life. That the horse was heavily worked in mechanical devices used in training is evidenced by the large amounts of granular tissue. He believed that during the showing the striking of the 10-ounce chains on this sensitized area aggravated the sensitivity and caused the pain noted.

11. Dr. George Classon was one of the team of five U.S.D.A. Veterinarians assigned to cover the Show on September 3, 1977. His specific assignment was to conduct a thermovision examination of the forelimbs of horses which were pointed out by Drs. Thompson and Everson as having the characteristics of being sore.<sup>1</sup>

Dr. Classon had no present recollection of the horse or his actions with respect to it, however, he signed Form 19-7 (Exhibit #2) on September 3 as having performed the thermovision examination. The thermovision machine is located in the examining area. It is usually the first examina-

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1. The thermovision process is described in *In re Peach Fleming* (H.P.A. Docket No 152-decided Oct. 6, 1981) as follows:

"Thermovision is a heat detection device which picks up infra-red radiation emitted by objects. It then translates it electrically into two different screens, a black and white and a color monitor. The color monitor has ten color bars at the bottom of the screen. Each of them represents a difference of one degree centigrade, and are used to compare temperatures in various portions of the horse's feet so that inflamed areas will be depicted. In front of the color monitor is a Polaroid camera which will take a picture (thermogram) of the image represented on the color screen. Thermovision measures the relative temperature of a horse's forelegs. It does so by using the coronary band as a reference point, which is the warmest area of the animal's foot. In a normal horse the surrounding temperature should decrease from 3 to 5 degrees centigrade. The coronary band is the focal point in measuring the anterior part of the foot, while the sulcus or pocket is the reference point of the posterior part of the foot. The sulcus has been found to be the warmest spot in the back of the horse's pastern, and the surrounding area should decrease in temperature from 3 to 5 degrees. Irregularities of the temperatures surrounding the coronary band or sulcus indicate inflammation."

tion of a horse. The thermogram pictures or the conclusions from them are passed to the examining veterinarians before or during their own examinations.

Dr. Classon took two colored pictures. One of these, Exhibit #6, shows the posterior view of the horse's front limbs below the knee, and the other, Exhibit #7, shows the anterior view of the horses front limbs below the knee. His testimony explained the significance of the colors in the pictures. In essence, he stated that in a normal horse the coronary band (shown on Exhibit #7) is supposed to have the warmest temperature and shows a yellow color on the photo. The other areas of the forefeet should have cooler temperatures as indicated by the other colors in correlation to the color scale at the bottom of the picture (reading from right to left in 1 degree centigrade lower gradations). Referring to Exhibit #7 he pointed to three small spots of blue color (circled in red) above the coronary band. He described these as being abnormally hot spots. Hotter than the coronary band. These spots are relatively in the same locations on the anterior of the horse's forefeet as the areas of sensitivity marked in Exhibit #2, Item 31. These blue spots indicate, according to his explanation, areas of abnormal sensitivity, because heat indicates inflammation, and inflammation indicates sensitivity. Exhibit #2 shows that Dr. Classon found and recorded in items 46 through 50 that the thermovision disclosed abnormal evidences of inflammation in both right and left forefeet, i.e., the hoof, pastern, fetlock, coronet and tendon areas.

Referring to Exhibit #6, Dr. Classon explained that in a normal horse the sulcus areas on the posterior of the forefeet are supposed to have the warmest temperature. These areas are shown as a yellow color on the pictures. The surrounding areas should show cooler temperatures as indicated by the other colors.

Looking at the two Exhibits we note a very substantial diffusion of yellow over several large areas outside both the sulcus and the coronary band areas. *This indicates broad areas of inflammation.* In addition, Exhibit #7 shows on the anterior pasterns of both forefeet additional and larger spots of blue color located not far above the circled blue spots, (which are indicated on Exhibit #2 to be locations of sensitivity to palpation). These blue colored areas would indicate, according to Dr. Classon's explanation of the significance of the colors, areas of inflammation which should similarly register sensitivity to palpation. Yet, the evidence adduced is that the two examining U.S.D.A. Veterinarians palpated *all areas of the forelimbs but found sensitivity only at the two places shown on Exhibit #2.*

12. Admittedly, a thermovision test is just a diagnostic aid to detect heat as a concomitant to inflammation which is usually reflected by sen-

sitivity. Sensitivity on palpation is also just another reflection of inflamed or damaged tissue. While we do not doubt the facts as found, the discrepancy between the thermogram pictures and the conclusions of the examining veterinarians does bring into question the conclusion reached by the examining veterinarians that the horse was sore because of the particular and isolated location of the sensitive areas as found on palpation. The thermovision pictures and the explanation of Dr. Classon shows the areas of inflammation to be more pervasive.

The conclusions of the examining veterinarians that the horse was sore at the time of their examinations appears to have been made without consideration of or exclusion of other possible causes of the sensitivity found. Dr. Critchfield described the standards followed by veterinarians in their examinations in 1977 as follows:

"A. Okay. We were looking for horses that indicated they were in pain upon movement, and experiencing pain in the normal movement, both being ridden, and just moved about in the examination area—we looked for pain on movement. We looked for bilateral pain—that means, pretty much the same amount of pain in significantly the same areas on the horse, indicative—that's to rule out the accidental injuries, or something else that might cause a unilateral condition.

And, then if we find the bilateral pain with our manual palpation in the areas we examined, and the thermovision will confirm that we have inflammation in those areas where we are finding it with our hands, then on those conditions, we did classify those horses as being sore as defined by the Horse Protection Act."

13. On the basis of our analysis of the facts adduced, we are impelled to the conclusion that the veterinarians, finding sensitivity in certain critical spots in both forelimbs, confirmed by existence of inflamed tissue by the thermovision, relied on the presumption in § 1825 (d) (5) and concluded that these facts, in addition to the granular tissue noted, which they concluded to be evidence of previous soring, were sufficient to support a finding that the horse was sore at the time of their examinations.

14. Respondents do not deny that the horse was in pain at the time of its withdrawal from the showing, or at the time of the U.S.D.A. Veterinarians examination. Their defense is that the sensitivity and pain noted was caused by a founder condition which was aggravated by the horse's feet striking the hard surface of the ramp, and to a severe abscess condi-

tion not known at the time but later disclosed. In effect, they would attempt to rebut the presumption in § 1825 (d) (5) which apparently had great weight in the conclusions of the examining U.S.D.A. Veterinarians.

15. Research indicates the only Article III Court decision interpreting the nature of the presumption contained in § 1825 (d) (5) was entered by the United States District Court for the Middle District of Tennessee on June 25, 1981, in the case of David Landrum and Dorothy Halsey vs. John Block, Secretary of Agriculture, (No. 81-1035). (Slip Op.).<sup>2</sup> In this decision the Court held in pertinent part that (pg. 6):

"Given the quasi-criminal nature of civil proceedings under the Horse Protection Act, due process forbids the presumption of section 1825 (d) (5) from shifting the burden of persuasion to defendants. *Cf. Sandstrom v. Montana, supra*. The burden of persuading the trier of fact that a horse was artificially sore remains with the Secretary from the beginning to the end of the administrative process. Due process does not require the Court to strike the presumption altogether, however, because the presumption may constitutionally shift the burden of going forward with the evidence to a civil defendant, once the Secretary has introduced evidence of abnormal sensitivity or inflammation in a horse's fore- or hindlimbs. Although F.R. Evid. 301 does not directly apply to this type of proceeding, *see* Rule 1101, F.R. Evid., the Court concludes that this Rule should be the model in assuring a constitutional interpretation of section 1825 (d) (5)"

Applying the guidelines and interpretation of the Court with respect to § 1825 (d) (5), we must consider and weigh the evidence introduced by respondents to rebut the evidence introduced by complainant that the horse was "artificially sore."

16. Respondent Billy Gray testified that he put the horse on an every other day routine for a few weeks prior to the Celebration, and that he never worked the horse at any time on a hard surface, because of its known founder condition. He did not want to risk lamining the animal by aggravating the founder condition. At the time of the Show he believed Scatman's Tom Cat to be in good condition because it had been shown several times in 1977, prior to the Celebration, and had no apparent difficulty. In his opinion, the horse was a veteran show horse and needed little training or workouts between shows. He stated that he did not sore

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2. Copy attached hereto for reference [Attachment omitted. See 40 A.D. 922 —Ed.]

the horse. He had no financial incentive to do so because he was paid a flat fee for his services, regardless of the results of showing.

Mr. Gray testified that he had no problems with the horse prior to turning him over to Mrs. Carter on the evening of September 3. He stated, however, that as he witnessed the horse's actions that evening as it came down the ramp and entered the ring he recognized that the horse was in difficulty. He immediately took the horse through the U.S.D.A. inspection after Mrs. Carter came out of the ring. He was told after the examination that the veterinarians considered the horse to be sore. That evening the horse was put in the van and carried back to his barn.

It was Gray's procedure to rest all the horses for a few weeks after the Celebration, which was the last of the summer show circuit. Scatman's Tom Cat was handled in no special way for a period of several days, however, the horse appeared to be acting "gimpy", or walking in an abnormal manner. This was attributed by Mr. Gray to the founder problem. When the condition of the horse appeared to be getting worse he took the horse, after consultation with Mr. Carter, to Dr. Dewitt Owen, an acknowledged veterinary expert in the treatment of horses.

17. The parties stipulated that the deposition of Dr. Owen would be taken and received in evidence in lieu of his personal appearance. It was taken on May 23, 1980, and a copy forwarded to the Hearing Clerk. This deposition was received in evidence and marked as Exhibit #8.

In his deposition Dr. Owen stated that Scatman's Tom Cat was brought to him on October 24, 1977, "for treatment of persistent lameness and a problem that they were just unable to keep him in training because of his lameness situation."

Dr. Owen generally discussed founder in response to questions. He stated that a horse never completely recovers from founder and the symptoms will always be present. However, since the condition varies, some animals with founder just cannot function, while others can function normally and, if handled properly, are not considered to be unsound. He stated that Scatman's Tom Cat was known to be chronically foundered.

Dr. Owen described his examination of the horse as follows:

"A The examination at the time that he was hospitalized revealed an extremely lame horse, primarily in his right fore and we immediately started . . . this horse was hospitalized late in the afternoon, and we started the next morning with our routine workup of blood chemistries and blood counts and at that time we found that *he had a large abscess around the coronary band of his right fore* which was opened and he was started on antibiotics and routine

therapeutic measures that you'd use on that type of a problem and we likewise kept this horse wrapped and sterile in antibiotic bandages during hospitalization, following the ruption of this abscess.

Q You say the abscess, when you got in there, shot this stuff everywhere, right?

A This abscess was a huge abscess and there was a copious amount of drainage from it.

Q Would that make a horse lame?

A Oh, absolutely.

Q Doctor, *you only found abscess on one foot*, is that right?

A Right fore and my records and my memory only show that it was in the right fore.

Q Did you wrap both feet?

A I have no record of doing that.

Q But you could have?

A I may have, but I rather doubt it.

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Q Now, he's been written up by the U.S. Department of Agriculture and their expert witnesses testified that a training device, more particularly a chain, had rubbed these callouses on the horse—right above the hoof between the fetlock and the hoof, until they became so sensitive that it went into the foot and this is what caused it to be sore and it so depicted on a thermovision picture as being indicated by two round blue dots above fetlock. Would this be consistent with a chain doing this Doctor?

A Due to the lack of credence, the total lack of credence that I put in thermovision, I would doubt very much that it would exhibit anything along the lines which you've just presented to me.

Q Would a founder exhibit itself as being hot inside the foot, or above the coronary band?

A If the founder was an active cause, you obviously would have an increased amount of temperature in that foot due to the increased blood supply inside the hoof and that, of course, would exhibit a rise in temperature which is the basis upon which the thermovision is used."

In connection with the abscess Dr. Owen stated:

"Q What caused, or do you know, is there any way to know what caused this abscess on this horse foot?

A I have no way whatsoever of identifying the cause of that abscess. That abscess could have been long standing and finally worked its way up through the wall of the foot or it may have been an injury to the coronary band which could have happened sometime previous. . . .

Q It could have been . . .

A Then erupted.

Q It could have been long standing?

A It could have been but there's no way you could differentiate that.

Q You wouldn't know?

A I wouldn't know.

Q But it was a severe abscess?

A That's right.

Q Was there swelling in the foot when you saw it or do you remember?

A The foot itself doesn't swell because that's a firm incasement but the coronary band was swollen and the pastern was swollen.

Q You'll have to forgive my terminology when I was referring to the foot I mean above the arch, between the foot and the fetlock is the part I'm talking about.

A The coronary band and pastern were extremely swollen.

Q And this type disorder or a founder that had become active, could this cause a horse not to want to go with a rider or not to want to walk in a ring?



A A ring or anyplace else. He would refuse to perform."

And further in response to other questions Dr. Owen stated:

"Q Doctor, just a couple of questions on this founder. First Doctor, you said the abscess was longstanding, can you give me a time reference for what you mean?

A Rather than being an acute abscess that would occur under forty-eight hours that was a massive abscess that had to form over a period of days and possibly even weeks. That's why I really can't tell you if it originated in the sole of the foot and worked up the wall of the foot or whether it originated at the coronary band and finally accumulated into the eruption.

Q Could it have been as much as six weeks old?

A Theoretically it could be but I have no way to put a time element on it.

Q Do you have even an estimate whether that was more likely or less likely?

A I would not answer that.

Q So it could be either?

A It could be."

18. For purposes of getting a more complete picture of the effect of founder on the physical condition of a horse, Dr. Critchfield was recalled to the stand. He described founder as:

"Q What, physically, is founder?

A Well, when you have a case of founder—acute founder, when it first happens, the blood rushes to, what we call, the sensitive lamina, which is an anatomical structure inside the hoof, and it—this is engorged with blood to such a state that it's painful to the horse, and unless proper treatment is taken immediately, why there can be permanent damage, and, many times is, to the sensitive lamina, which are between the third falanks, which are commonly called the coffin bone—the last bone down inside the hoof, and the horney wall, is the structure that's between that, and the blood supply is engorged in there.

You can get damage to these structures in there many times, and you will have a deformity of the hoof take place; and, this can manifest visibly later on in the—there would be a characteristic ridging in the outer walls of the hoof, the sole on the bottom of the hoof drops, as we say, it comes down to an abnormal position; the horny wall and the sole may separate—you'll have a separation there, inside there.

These are some of the things we see in chronic founder—the acute phase is over with.

In the acute phase of founder, why, there's a lot of pain in the hoof area.

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Q Now, Doctor, if you were to physically examine a horse that had founder, would you see the critical symptoms that you've described in the pastern area of the horse?

A No, I wouldn't think you would see pain and sensitivity in the pastern region; a horse hurting inside the hooves with a foundered condition, now, he would exhibit pain on movement and have a characteristic way of moving that would exhibit pain; but, as far as a palpation, I don't think you could diagnose it—determine much about founder by palpating the pastern region, — shouldn't be a diagnosis for founder."

19. An examination of all of the evidence discloses that this horse was suffering from a severe abscess around the coronary band of his right foot, and, further, that the horse had a long history of founder in both front feet. The testimony of Dr. Critchfield is that an *acute* case of founder can be very painful, and the testimony of Dr. Owen is that an abscess in a leg results in such pain that a horse will just refuse to perform.

This horse was apparently in no physical pain when it was examined by the Show Veterinarian and the Show Steward a few minutes before entering the ring. At that time it moved freely and presented a good appearance, as well as showing no sensitivity on palpation of the forelimbs by the Steward. Yet, within *one minute or so* after entering the ring it refused to perform. Obviously, something happened to this horse to cause it extreme pain during that short space of time. There was insufficient time for the horse to have so aggravated the granular tissue of the

forelimbs to such a painful degree as evidenced by the action of the chain against the forelimbs during that short time. The evidence strongly suggests that the event which caused the sudden pain was an aggravation of the abscess and an action which caused the latent founder condition to become acute. The only recorded event was the sudden increase in pressure on the forelimbs as the horse's forefeet struck the hard surface of the ramp on entering the ring. The evidence would indicate that this sudden change in pressure would be sufficient, given the physical state of the horse's forefeet, to result in the very evident painful reaction noted. We so find.

20. The preponderance of the evidence adduced is that this horse was not sored by artificial means as that term is defined in the Act, and that the sensitivity found on examination by the U.S.D.A. Veterinarians was due to the above-described causes.

21. The complaint, as amended, charges that respondents violated § 1824 (7) of the Act, *supra*, in that they violated section 11.2 (d) of the Regulations (9 CFR 11.2 (d) ) as follows:

"7. That at the time the horse was shown, its front pasterns were covered with a black foreign substance not permitted by 9 CFR 11.2 (d)."

In support of this charge the record discloses that Exhibit #2, Item 39, mentions the presence of a "foreign substance" — a "black dye in the pastern region." Exhibit #3, fails to mention this foreign substance at all. Exhibit #4 simply notes the presence of "a black pigmented foreign substance on the surfaces of both front pasterns" without any further observation. Obviously, at the time the examining veterinarians did not attach much significance to this fact. A sample of this substance was taken by Dr. Critchfield at the time of his examination. This sample was enclosed in a plastic bag, marked for identification, and given to the Compliance Officer in whose custody it remained until the time of the hearing. The sample, or swab, was introduced into evidence as Exhibit #1.

Altho Dr. Critchfield testified that he had no recollection of the events of the examination, nevertheless, he stated at the hearing that this substance was not the lubricant provided that night by the Show Management. No sample of the lubricant provided by Management was introduced for comparison purposes or even described.

No evidence was introduced by the complainant which would shed any further light on what this Exhibit #1 was. The statements of record by the examining Veterinarians, i.e., Exhibits #2, 3 and 4, strongly support the conclusion that the apparent sole purpose of this substance was to serve as a cosmetic to darken the normal light color of the granular tissue to conform to the dark color of the rest of the horse. There is no

mention by them of where this substance came from, when it was applied, or that it was not applied in accordance with the Regulations. No chemical analysis of this sample was made, and no questions about it were asked by the examining Veterinarians at the time of their examinations, or by the Compliance Officer at the time of his investigation. Only its existence was mentioned in the affidavits (Exhibits #3 and 4) and on Form 19-7 (Exhibit #2). There is no evidence or even inference that this substance was, or contained, a chemical irritant or caustic which would cause pain to the horse on movement which is the thrust of the Act.

22. At the hearing respondent Billy Gray stated that this substance was simply grease. He testified that it was a lubricant provided by the Show personnel which was available to all trainers for use on their entries. Its purpose when applied to the pasterns of the horses was to minimize the effect of chain-rub during the Show. This is a common practice. He stated that he applied this lubricant to all of his horses on that evening — and he had in all some 33 entries in the Show.

23. On the basis of the facts of record we find that complainant has failed to advance probative evidence which would support this charge in the amended complaint that the Act was violated in the particular alleged. Violation of the Act is a serious charge and the sanctions for violation are heavy. Such charges must be supported by a preponderance of probative evidence. This complainant has failed to do.

#### CONCLUSIONS

We have carefully examined all of the probative evidence presented and conclude that the charges in the complaint are not supported for the reasons given in the Findings of Fact. Accordingly, the complaint should be dismissed.

All motions, requests, and proposed findings of fact advanced by the parties which are not specifically discussed herein and which are incompatible with this decision are denied.

#### ORDER

The action is dismissed on the merits.

This decision shall become final without further proceedings thirty-five (35) days after service thereof on respondents unless an appeal is filed to the Judicial Officer by a party hereto within thirty (30) days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. 1.130 *et seq.*). [The Decision on Remand became final on February 10, 1983.—Ed.]

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*In re* JOE H. DIETZ. HPA Docket No. 165. Decided February 24, 1983.

**Complaint, dismissed with prejudice**

Where complainant failed to sustain the charges against respondent, the complaint is dismissed with prejudice.

*Victor W. Palmer*, Administrative Law Judge.

*Morris Selinger*, for complainant

*G. Thomas Blankenship*, Indianapolis, Ind., for respondent.

*Decision by Donald A. Campbell, Judicial Officer.*

**DECISION AND ORDER**

This is an administrative proceeding seeking recovery of a civil penalty and the disqualification of respondent under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*). The complaint charges Mr. Dietz, as the owner of a Tennessee Walking Horse, with exhibiting and allowing the exhibition of a horse that was "sore," within the meaning of the Act and the regulations promulgated thereunder (15 U.S.C. § 1821 (3) and 9 CFR § 11.1 (y)), in the Tennessee Walking Horse National Celebration on August 25, 1979.

After a hearing, Administrative Law Judge Victor W. Palmer filed an initial decision and order on December 1, 1982, in which he concluded that the complainant failed to sustain the charges against respondent. On December 30, 1982, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35). The case was referred to the Judicial Officer for decision on January 28, 1983.

Although I believe that the "cold record" strongly supports complainant's position in this case, there is conflicting evidence that would support a decision for either party. Accordingly, I am affirming Judge Palmer's dismissal of the complaint. As stated in *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 957 (1982):

It has been recognized in many administrative and judicial decisions that the judge who sees and hears the witnesses testify has a great advantage over the Judicial Officer or a reviewing court in determining the credibility of the witnesses and, therefore, in finding the facts.

The proper exercise of the fact-finding function is of great importance both to the agency and the respondents in particular cases. That is why administrative law judges must meet such stringent requirements and are selected with such great care. In recognition of the role of the Judicial Officer (which is primarily to establish agency policy in particular cases and to correct errors of law) and the role of the administrative law judges (which is primarily to find the facts), it is the policy of the Judicial Officer to reverse an administrative law judge's findings of fact only where the record compels such action.

I must add, however, that I believe Judge Palmer erred in failing to resolve the conflict in evidence as to the key issue in the case. I believe there is an irreconcilable conflict between complainant's evidence and respondent's evidence as to whether the horse's pasterns were abnormally sensitive following the Show. Two USDA veterinarians palpated the horse's pasterns following the Show and determined that the horse was severely sore. Shortly later, while the horse was still in the custody of USDA personnel, two expert lay persons, who were the Designated Qualified Persons assigned to conduct the pre-show examinations to disqualify sore horses, palpated the horse's pasterns and found no sensitivity.

The USDA veterinarians were critical of the DQP's examinations (*e.g.*, Tr. 30-37, 86-88, 100-01), and one of the DQPs felt that the Department's veterinarians do not properly palpate a horse that has scars, such as were involved here (Tr. 224, 237).

Instead of resolving the conflict, Judge Palmer adopted the views in both directions. That is, he found that the horse "manifested abnormal sensitivity and inflammation in both of its forelimbs when examined by the USDA veterinarians" (Initial Decision 13), but that the sensitivity "disappeared by the time the DQP's again examined the horse later that evening" (Initial Decision 15).

If the horse actually manifested the sensitivity claimed by the USDA veterinarians, I do not believe it disappeared by the time the DQPs examined the horse. The evidence in this record (Tr. 211, 223-24) and in other cases (*e.g.*, *In re Stamper*, 42 Agric. Dec. \_\_\_\_, slip op. 25-26 (Jan. 11, 1983), *appeal docketed*, No. 83-7063 (9th Cir. Feb. 1, 1983)) suggests that the sensitivity would have been greater—not less—by the time the DQPs examined the horse.

Accordingly, I believe that Judge Palmer should have resolved the conflicting testimony rather than accepting both viewpoints. But it is not the Judicial Officer's function to compel him to do so when the examinations were conducted at different times.

If Judge Palmer had not accepted the DQPs' determinations that the horse had no sensitivity when they examined the horse, I would have drawn the inference that the horse experienced physical pain during the Show, irrespective of what inference Judge Palmer may have drawn. But in view of Judge Palmer's acceptance of the determinations by the DQPs that the horse had no sensitivity when they examined her, I cannot infer that the horse suffered pain or distress during the Show.

For the foregoing reasons, the complaint must be dismissed.

#### ORDER

The complaint filed against respondent is dismissed with prejudice.

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(No. 22,330)

*In re* CLAUDE CROWLEY and STEVE REES. HPA Docket No. 186. Decided February 28, 1983.

#### Civil penalty—Consent

Respondent Rees consented to an order assessing him a civil penalty of \$1,000.00.

*Donald A. Truay*, for complainant

*John Tanner*, Union City, Tenn., for respondent.

*Decision by John A. Campbell, Administrative Law Judge.*

#### CONSENT DECISION WITH RESPECT TO RESPONDENT STEVE REES

This is an administrative proceeding under the Horse Protection Act as amended (15 U.S.C. 1821 *et seq.*), instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that respondents have violated the Horse Protection Act, as amended. This consent order has been entered into between the parties under authority of the applicable Rules of Practice (7 CFR 1.138).

Respondent Rees admits the jurisdictional allegations of the complaint and waives further procedure under applicable Rules of Practice (7 CFR Part 1). Mr. Rees and the complainant consent to the issuance of this decision agreed upon between them for the purpose of settling this matter.

## FINDINGS OF FACT

1. Mr. Steve Rees is an individual who resides in Union City, Tennessee. At all times material herein, he was the trainer of "Gunsmoke's Go Bang" hereinafter referred to as "the horse."

2. On or about July 31, 1981, the horse was entered as entry No. 115 class No. 4 at the Belfast Horse Show in Belfast, Tennessee.

3. After being excused by the Designated Qualified Person, the horse was examined by United States Department of Agriculture veterinarians. In the opinion of these veterinarians the horse was "sore" as that term is defined under the Horse Protection Act.

4. Mr. Rees states that he did not know the horse was sore on the date in paragraph two above.

5. Mr. Rees neither admits nor denies liability in this matter.

## CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of a consent order, the following order is issued.

## ORDER

Respondent Steve Rees is assessed a civil penalty of \$1000, which shall be payable by a certified check or money order to the Treasurer of the United States and forwarded to Donald A. Tracy, Office of the General Counsel, Room 2014 South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the date this order becomes effective. This order shall be effective upon service on Respondent Steve Rees.

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## DISCIPLINARY DECISIONS

(No. 22,331)

*In re* MICHAEL E. BRAY, d/b/a BRAY LIVESTOCK. P & S Docket No. 6025. Decided January 6, 1983.

Dealer—Insufficient funds checks—Failure to pay when due—Civil penalty—Default

Respondent is ordered to cease and desist from issuing insufficient funds checks and failing to pay, when due, the full purchase price of livestock. Respondent is assessed a civil penalty of \$3,500.00.

*Allan R. Kahan*, for complainant.

*Decision by John A. Campbell, Administrative Law Judge.*

DECISION AND ORDER UPON ADMISSION  
OF FACTS BY REASON OF DEFAULT

## PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed by the Acting Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent has willfully violated the Act.

Copies of the Complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint. Respondent filed a letter with the Hearing Clerk on June 22, 1982, requesting an oral hearing and stating that his attorney was preparing a letter of defense in response to the allegations of the complaint. Attorney for complainant, on August 5, 1982, requested that a hearing date be set. Administrative Law Judge John A. Campbell set this matter to be heard on November 30, 1982. On October 1, 1982, Judge Campbell filed a Memorandum stating that he had ascertained that the attorney named by respondent as his attorney was *not* representing the respondent. Attorney for complainant then requested that a pre-hearing telephone conference be held to determine if respondent was represented and was, in fact, ready to proceed to the oral hearing scheduled in this proceeding. Such conference was not held because respondent could not be contacted. On Oc-

tober 21, 1982, Judge Campbell issued an order cancelling the oral hearing scheduled in this matter, and granting respondent an additional 20 days to respond to the allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### FINDINGS OF FACT

1. (a) Michael E. Bray, doing business as Bray Livestock, hereinafter referred to as the respondent, is an individual whose business mailing address is 5401 Business Park South # 105, Bakersfield, California 93302.

(b) The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) A dealer within the meaning of that term as defined in the Act and subject to the provisions of the Act.

2. (a) The respondent, in connection with his operations as a dealer, on or about November 30, 1981, purchased 271 head of livestock from Mid-Columbia Livestock Exchange, Inc., the Dalles, Oregon, and in purported payment of the \$68,632.37 due for such livestock, issued Check No. 203 which was returned unpaid by the bank upon which it was drawn because respondent did not have sufficient funds available in the account upon which such check was drawn to pay such check when presented.

(b) Respondent, on or about November 30, 1981, in the transaction set forth above, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of March 24, 1982, there remained unpaid by the respondent a total of \$68,632.37 for such livestock purchase.

#### CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated sections 312 (a) and 409 of the Act (7 U.S.C. §§ 213 (a), 228b).

#### ORDER

The respondent, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 312 (b) of the Act (7 U.S.C. § 213 (b)), respondent is assessed a civil penalty of Three Thousand Five Hundred Dollars (\$3,500.00).

This order shall be effective from the sixth day after the decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). [The Decision and Order became final on February 14, 1983.—Ed.]

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(No. 22,332)

*In re* SMITH BROTHERS STOCKYARDS, INC., and JOE MACK SMITH.  
P & S Docket No. 6013. Decided January 11, 1983.

Dealer—Market agency—Shippers' proceeds account—Net proceeds—  
Suspension of registration—Civil penalty—Default

Respondents are ordered to cease and desist from failing to deposit into or maintain properly their account for shippers' proceeds; failing to remit net proceeds when due, and using funds for purposes other than the payment of lawful marketing charges and the remittance of net proceeds. The corporate respondent is suspended as a registrant for 30 days and thereafter until no longer insolvent and the deficit in its custodial account has been eliminated, and the individual respondent's suspension as a registrant is to run concurrently with the corporate respondent for 30 days. Respondents are jointly and severally assessed a civil penalty of \$1,000.00.

*Lydia Lizarribar*, for complainant

*Decision by William J. Weber, Administrative Law Judge.*

DECISION AND ORDER UPON ADMISSION  
OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States De-

partment of Agriculture, charging that the respondents have wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the Complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### FINDINGS OF FACT

1. (a) Smith Brothers Stockyards, Inc., hereinafter referred to as the corporate respondent, is a corporation with its principal place of business located at Highway 26 East, Poplarville, Mississippi, and whose mailing address in P.O. Box 306, Poplarville, Mississippi 39470.

(b) The corporate respondent, at all times material herein, was:

(1) Engaged in the business of conducting and operating the Smith Brothers Stockyards stockyard, a posted stockyard under the Act;

(2) Engaged in the business of a market agency selling livestock on a commission basis in commerce; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

(c) Joe Mack Smith is an individual whose mailing address is P.O. Box 306, Poplarville, Mississippi 39470.

(d) The individual respondent, at all times material herein, was:

(1) President of the corporate respondent and managed, directed and controlled the business activities of said corporate respondent; and

(2) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce.

2. (a) The corporate respondent's current liabilities as of February 4, 1982, exceeded its current assets. As of said date, the corporate respondent had current liabilities totaling \$36,509.68 and current assets totaling \$19,951.77, resulting in an excess of current liabilities over current assets of \$16,557.91.

(b) The corporate respondent's current liabilities presently exceed its current assets.

3. The corporate respondent, during the period from November 30, 1981, through February 4, 1982, under the management, direction and control of the individual respondent, failed to maintain and use properly its custodial account for shippers' proceeds, thereby endangering the faithful and prompt accounting therefor and payment of the portions thereof due to owners or consignors of livestock, in that:

(a) As of November 30, 1981, the corporate respondent had outstanding checks drawn on its custodial account for shippers' proceeds in the amount of \$66,273.90, and had, to offset such checks, a balance per bank statement of \$941.30, resulting in a deficiency of \$65,332.60 in funds available to pay shippers their proceeds;

(b) As of December 21, 1981, the corporate respondent had outstanding checks drawn on its custodial account for shippers' proceeds in the amount of \$105,909.46, and had, to offset such checks, a balance per bank statement of \$40,719.02 and deposits in transit of \$11,282.63, resulting in a deficiency of \$53,907.81 in funds available to pay shippers their proceeds;

(c) As of December 28, 1981, the corporate respondent had outstanding checks drawn on its custodial account for shippers' proceeds in the amount of \$58,279.17, and had, to offset such checks, a balance per bank statement of \$4,108.72 and deposits in transit of \$18,580.00, resulting in a deficiency of \$35,590.45 in funds available to pay shippers their proceeds;

(d) As of December 32, 1981, the corporate respondent had outstanding checks drawn on its custodial account for shippers' proceeds in the amount of \$49,533.84, and had, to offset such checks, a balance per bank statement of \$3,556.39, resulting in a deficiency of \$45,977.45 in funds available to pay shippers their proceeds;

(e) As of February 4, 1982, the corporate respondent had outstanding checks drawn on its custodial account for shippers' proceeds in the amount of \$30,401.09, and had no funds available to offset such checks, resulting in a deficiency of \$30,401.09 in funds available to pay shippers their proceeds; and

(f) Such deficiencies were due, in part, to respondent's failure to deposit in its custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from sales of condemned livestock, and the issuance of checks drawn on the custodial account for purposes other than payment of lawful marketing charges and the remittance of net proceeds to the shippers of livestock.

4. (a) Respondents, on or about the dates and in the transactions set forth in paragraph IV(a) of the Complaint, and in numerous other transactions during the period of October 28, 1981, through January 6, 1982, failed to remit to consignors of livestock, when due, the net proceeds due from the sale of their livestock.

(b) As of March 3, 1982, there remained unpaid a total of \$25,814.10 due to consignors of livestock.

### CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 3 herein, the respondents have wilfully violated sections 307 and 312 (a) of the Act (7 U.S.C. §§ 208, 213 (a) ), and sections 201.41 and 201.42 of the regulations (9 C.F.R. §§ 201.41, 201.42).

By reason of the facts found in Finding of Fact 4 herein, the respondents have wilfully violated sections 307 and 312 (a) of the Act (7 U.S.C. §§ 208, 213 (a) ).

### ORDER

The corporate respondent, its successors, officers, directors, agents and employees, and the individual respondent, directly or through any corporate or other device, shall cease and desist from:

1. Failing to deposit in their Custodial Account for Shippers' Proceeds, within the time prescribed in section 201.42 (c) of the regulations (9 C.F.R. § 201.42 (c) ), amounts equal to the proceeds receivable from the sale of consigned livestock;

2. Failing to otherwise maintain their Custodial Account for Shippers' Proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. § 201.42);

3. Failing to remit to consignors of livestock, when due, the net proceeds due from the sale of their livestock; and

4. Using funds received as proceeds from the sale of livestock sold on a commission basis for purposes other than the payment of lawful marketing charges and remittance of net proceeds to consignors.

The corporate respondent is suspended as a registrant under the Act for a period of 30 days and thereafter until such time as it demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated. When corporate respondent demonstrates that it is no longer insolvent and that the deficit in its Custodial Account for Shippers' Proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the 30 day period.

The individual respondent, Joe Mack Smith, is suspended as a registrant under the Act for a period of 30 days, to run concurrently with the corporate respondent's 30 day suspension.

In accordance with section 312 (b) of the Act (7 U.S.C. § 213 (b)), respondents are jointly and severally assessed a civil penalty in the amount of \$1,000.00 (One Thousand Dollars).

This order shall be effective from the sixth day after the decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). [The Decision and Order became final on February 18, 1983.—Ed.]

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(No. 22,333)

*In re* BURTON FARMS INC., and PATRICK MALONE. P & S Docket No. 6071. Decided January 14, 1983.

Dealer—Market agency—Insufficient funds checks—Failure to pay when due—Suspension of registration—Default

Respondents are ordered to cease and desist from issuing insufficient funds checks, and failing to pay, when due, the full purchase price of livestock. The corporate respondent is suspended as a registrant for 9 months and thereafter until no longer insolvent. The individual respondent is suspended under the Act for 9 months and thereafter until he demonstrates he is no longer insolvent as provided for in the order issued January 8, 1981.

*Lydia Lizarribar*, for complainant

*Decision by Dorothea A. Baker, Administrative Law Judge.*

DECISION AND ORDER UPON ADMISSION  
OF FACTS BY REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents have wilfully violated the Act and the regulations issued thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the Complaint and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respond-

ents by the Hearing Clerk by certified mail. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### FINDINGS OF FACT

1. (a) Burton Farm, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and existing under the laws of the State of Missouri, with the principal place of business located at Camdenton, Missouri. Its mailing address is P.O. Box 6 DE, Camdenton, Missouri 65020. Respondent Patrick Malone organized the corporate respondent in May 1980. All of the stock of the corporate respondent is held in the name of respondent Malone's wife.

(b) The corporate respondent, at all times material herein, was:

(1) Engaged in the business of buying livestock on a commission basis in commerce, and buying and selling livestock in commerce for its own account; and

(2) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis.

(c) Patrick Malone, hereinafter referred to as the individual respondent, is an individual whose mailing address is P. O. Box 6 DE, Camdenton, Missouri 65020.

(d) At all times material herein, the individual respondent managed, directed and controlled the business practices and activities of the corporate respondent, including those practices which are alleged in the complaint to be violations of the Act.

(e) The individual respondent is a dealer and market agency within the meaning of those terms as defined in the Act, and subject to the provisions of the Act.

2. In a disciplinary proceeding captioned *In re Patrick D. Malone*, P. & S. Docket No. 5803, a consent decision and order was issued against the individual respondent on January 8, 1981, requiring him, individually or through any corporate or other device, to cease and desist from (a) issuing checks in payment for livestock purchased without having sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented; (b) failing to pay, when due, the full purchase price of livestock; and (c) failing



to pay the full price of livestock. In addition, in that proceeding, the individual respondent was suspended as a registrant under the Act for a period of sixty days, and thereafter until he had demonstrated that he was no longer insolvent. The individual respondent has not demonstrated that he is no longer insolvent, and, therefore, the suspension of the individual respondent as a registrant remains in effect.

3. (a) The corporate respondent's financial condition does not meet the requirements of the Act in that as of April 13, 1982, the corporate respondent had current liabilities totalling \$47,870.00, and current assets totalling \$31,061.04, resulting in an excess of current liabilities over current assets of \$16,808.96.

(b) The corporate respondent's current liabilities presently exceed its current assets.

4. (a) The corporate respondent, under the direction, management and control of the individual respondent, on or about the dates and in the transactions set forth in paragraph IV (a) of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have and maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) The corporate respondent, under the direction, management and control of the individual respondent, on or about the dates and in the transactions set forth in paragraph IV (a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

#### CONCLUSIONS

By reason of the facts found in Finding of Fact 3 herein, the corporate respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

By reason of the facts found in Finding of Fact 4 herein, the respondents have wilfully violated sections 312 (a) and 409 of the Act (7 U.S.C. §§ 213 (a), 228b).

#### ORDER

Respondent Burton Farms, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Patrick Malone, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented for payment; and

2. Failing to pay, when due, the full purchase price of livestock.

Respondent Burton Farm, Inc., is suspended as a registrant under the Act for a period of nine (9) months and thereafter until such time as it demonstrates that it is no longer insolvent. When corporate respondent demonstrates that it is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the nine (9) month period.

On January 8, 1981, a consent decision and order was issued in a disciplinary proceeding instituted under the Act captioned *In re Patrick Malone* (P. & S. Docket No. 5803) That decision and order became final and effective and provided, in part, that the individual respondent herein, Patrick Malone, be "suspended as a registrant under the Act for a period of sixty (60) days and thereafter until he demonstrates that he is no longer insolvent."

It is hereby ordered that respondent Patrick Malone is suspended under the Act for a specified period of nine (9) months commencing on the effective date of this order. This suspension shall remain in effect beyond the specified nine (9) month period until such time as respondent Patrick Malone demonstrates that he is no longer insolvent as provided in the order of January 8, 1981 (P. & S. Docket No. 5803).

This order shall be effective from the sixth day after the decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*). [The Decision and Order became final on February 26, 1983.—Ed.]

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*In re* EMBRY LIVESTOCK COMPANY. P & S Docket No. 6100. Decided February 22, 1983.

Dealer—Market agency—Misrepresentation—Accounts of purchase—  
Misleading price entries—Accounts and records—Civil penalty—Consent

Respondent consented to an order to cease and desist from misrepresenting the original purchase prices of livestock, misrepresenting the nature of charges made for its services, issuing accounts of purchase, invoices or billings showing false, inaccurate or misleading price entries; collecting payment on the basis of such price entries, and inserting or failing to insert in accountings, any statement or omission which results in a false, inaccurate or misleading record. Respondent is ordered to maintain complete and accurate records and is assessed a civil penalty of \$5,000.00

Allan R. Kahan, for complainant.  
Respondent, *pro se*

*Decision by John G. Liebert, Administrative Law Judge.*

#### DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

#### FINDINGS OF FACT

1. Embry Livestock Company, Inc., hereinafter referred to as the respondent, is a corporation whose business mailing address is P.O. Box 4006, 1048 E. Main Street, Louisville, Kentucky 40206.
2. The respondent is, and at all times material herein was, engaged in the business of buying and selling livestock for its own account and buying livestock on a commission basis.
3. The respondent is, and at all times material herein was, registered with the Secretary of Agriculture as a dealer buying and selling livestock

in commerce and as a market agency buying livestock on a commission basis

### CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

### ORDER

The respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

1. Misrepresenting to its principals (a) the original purchase prices for livestock purchased on a commission basis; or (b) the nature of the charges made for its services;

2. Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, or any other document showing false, inaccurate, or misleading price entries for such livestock;

3. Collecting payment from the purchasers of livestock on the basis of false, inaccurate, or misleading price entries on accounts of purchase, invoices, or billings; and

4. Inserting or failing to insert in accounts of purchase, invoices, billings, or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in its business as a market agency or dealer subject to the Act including accounts of purchase and invoices which show the true and correct purchase price of livestock purchased on a commission basis.

In accordance with section 312 (b) of the Act (7 U.S.C. § 213 (b)), respondent is hereby assessed a civil penalty of Five Thousand Dollars (\$5,000.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

## MISCELLANEOUS ORDERS

## SUPPLEMENTAL ORDERS

(No. 22,335)

*In re* THOMAS JOHN FULLER. P & S Docket No. 5566. Order issued February 28, 1983 by William J. Weber, Administrative Law Judge. Respondent's deficit in his custodial account has been eliminated—suspension terminated.

(No. 22,336)

*In re* THOMAS B. WEINBERG and FREDERICK A. WEINBERG. P & S Docket No. 5984. Order issued February 8, 1983 by John A. Campbell, for William J. Weber, Administrative Law Judge. Respondents have demonstrated they are no longer insolvent—suspension terminated.

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STAY ORDER

(No. 22,337)

*In re* MATTES LIVESTOCK AUCTION MARKET, INC., a corporation, PHILIP MATTES, SR. and PHILIP MATTES, JR, individuals. P & S Docket No. 5911. Order issued February 3, 1983 by Donald A. Campbell, Judicial Officer. The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

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REPARATION DECISION

MISCELLANEOUS ORDER ISSUED BY  
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,338)

FRED HOLMES d/b/a WASHINGTON COUNTY LIVESTOCK, INC. v. DEAN  
CHARLING d/b/a CHARLING CATTLE CO. P & S Docket No.  
5930. Order issued February 17, 1983.

DENIAL OF PETITION TO REOPEN HEARING OR  
TO TAKE DEPOSITIONS

On December 20, 1982, a Decision and Order was issued herein requiring respondent Dean Charling to pay \$4,398.43 plus interest as reparation to complainant Fred Holmes.

Respondent has filed two similar documents in this proceeding. One contains the following statement: "We wish to have the reparation complaint reopened for oral hearing or to take depositions from the below named." The other document contains this statement: "We wish to have the reparation complaint and order appealed for oral hearing or to take depositions from the below named." Both documents then list the names of six individuals and indicate some of them could appear in person to testify.

Rule 9 of the Rules of Practice regarding depositions provides in part (9 C.F.R. 202.109):

- (a) *Application.* Any party may file an application for an order for the taking of testimony by deposition, at any time after docketing of a proceeding and before the close of an oral hearing or the filing of such party's evidence in a written hearing therein.

Rule 17 of the Rules of Practice governing this proceeding provides in part (9 C.F.R. 202.117):

- (a) *Filing of petition* — (1) *To reopen a hearing.* Any party may file a petition to reopen a hearing to take further evidence, at any time prior to the issuance of the final order, or prior to a tentative order becoming final. Such a petition must state the nature and purpose of the evidence to be offered, show that it is not merely cumulative, and state a good reason why it was not offered at the hearing if oral, or filed in the hearing if written.

(2) To rehear or reargue a proceeding or reconsider an order. Any party may file a petition to rehear or reargue a proceeding or reconsider an order of the judicial officer, at any time within 20 days after service on such party of such order. Such a petition must specify the matters claimed to have been erroneously decided, and the basis for the petitioner's claim that such matters were erroneously decided.

The oral hearing has closed in this proceeding and a final order has been issued. Under Rule 9 (a) of the Rules of Practice an application to take testimony by deposition cannot be entertained after the close of the oral hearing. Under Rule 17 (a), a petition to reopen the hearing can only be entertained if received before the issuance of the final order.

If the two documents filed by respondent constitute a petition to rehear or reargue the proceeding or reconsider the order, they do not satisfy Rule 17 (b) which requires specification of "the matters claimed to have been erroneously decided, and the basis for the petitioner's claim that such matters were erroneously decided."

The Rules of Practice governing reparation proceedings do not provide for appeal.

#### ORDER

For the reasons stated above, the petition filed by respondent Dean Charling is denied.

Copies hereof shall be served upon the parties.

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DISCIPLINARY DECISIONS

(No. 22,339)

*In re* AMERICAN FRUIT PURVEYORS, INC. PACA Docket No. 2-5954. Decided December 1, 1982.

**Failure to make full payment promptly—Violations, of Section 2 of the Act—License, revocation of**

Respondent's failure to make full payment promptly to 15 sellers for 326 lots of perishable agricultural commodities it received and accepted constitutes wilful, flagrant and repeated violations of the Act for which respondent's license is revoked

*Jonnise M. Conanan*, for complainant  
Respondent, *pro se*.

*Decision by Dorothea A. Baker, Administrative Law Judge.*

DECISION AND ORDER

PRELIMINARY STATEMENT

This is an administrative disciplinary action initiated by a Complaint filed on February 24, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, alleging that the Respondent herein had willfully, flagrantly and repeatedly violated the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) and the regulations issued thereunder (7 C.F.R. Part 46). More specifically, the Complaint alleges that during the period November 1980 through June 1981, the Respondent violated Section 2 (4) of the Act by purchasing 326 lots of perishable agricultural commodities from 15 sellers in interstate commerce, which commodities were received and accepted by Respondent, but for which Respondent failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$272,997.75. The Respondent filed an Answer on March 17, 1982, generally denying the allegations of the Complaint and requested an oral hearing.

An oral hearing took place on May 4, 1982, in Miami, Florida, before Administrative Law Judge Dorothea A. Baker. The Complainant was represented by Jonnise M. Conanan, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., and the Respondent appeared *pro se* through Harry Sturm. Part way through the hearing, Mr. Dennis Sturm, the son of Mr. Harry Sturm, also entered a *pro se* appearance on behalf of the Respondent. The parties were given the opportunity to file briefs, the last brief having been filed on August 16, 1982.



After the close of the briefing time, the Complainant, through counsel, filed a "Request to Take Official Notice" on November 9, 1982.

Premised upon the record evidence in this proceeding, the following Findings of Fact are made.

#### FINDINGS OF FACT

1. Respondent is a Florida corporation whose address is 730 First Street, Miami, Florida 33139.

2. Pursuant to the licensing provisions of the PACA, license number 176120 was issued to Respondent on June 2, 1958. This license was renewed annually and was subject to renewal on or before June 2, 1982.

3. During the period November, 1980, through June, 1981, Respondent purchased, received, and accepted 326 lots of perishable agricultural commodities, from 15 sellers in interstate commerce, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$272,997.75.

4. On July 31, 1982, Respondent filed a Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §1101, *et seq.*) in the United States Bankruptcy Court for the Southern District of Florida at Miami. The case was assigned case No. 81-01185-BKC-SMW.

5. Subsequent to the expiration of the briefing time, and on November 9, 1982, attorney for the Complainant filed a "Request to Take Official Notice" to the effect that official notice be taken of the fact that Respondent's Chapter 11 Bankruptcy proceeding had been converted to a Chapter 7 case, pursuant to 11 U.S.C. 1112. In support thereof there was attached to said Request a copy of an Order signed by Bankruptcy Judge, Sidney M. Weaver, on September 9, 1982. Said Request for Official Notice is granted.

6. Because of the pendency of the Chapter 11 proceedings at the time of the oral hearing, the record was kept open until July 1, 1982, to allow for the submission of a summary indicating the extent to which the amounts alleged in the Complaint had been satisfied as of that date. No such summary was submitted by the Respondent.

7. Prior to the filing of the Chapter 11 Bankruptcy Petition, the Respondent was attempting to enter into financial arrangements whereby his creditors would be paid over a period of ten years.

8. By reason of prior administrative disciplinary actions against the Respondent by the Department of Agriculture, the Respondent's license was suspended for 44 days, effective June 12, 1981.

9. The Respondent indicated that he has encountered difficulties with the Department of Agriculture over a time span of approximately 25 years, and he believes that his difficulties are the result of actions taken

by personnel of the Department of Agriculture. The Respondent's complaints include his allegation.

"\* \* \* there can't be any negotiations with the Department of Agriculture as they always take a dictatorial attitude and never even discuss anything with you." (Tr. 4)

In Respondent's "brief" filed July 19, 1982, it is asserted therein, among other things,

"This case was instigated, not by my suppliers, but by Mike Clancy an employee of the USDA. This procedure seems extremely odd to me as I feel that the Department acts for the well being of license-holders. Why, therefore, when my suppliers were perfectly happy with my method of payment did Mike Clancy take it upon himself to bring a case against American Fruit Purveyors and for a reason such as slow payment. \* \* \* \* \*

American Fruit was forced into bankruptcy by the USDA due to our license being suspended-making our payments slower than ever and encumbering our company with crippling legal costs which we could ill-afford. Through their actions, the Department has not helped my suppliers or myself. On the contrary they have only hindered the situation. The only conclusion I can draw from this procedure is that I have been singled out by the Department for 'special treatment' due to a case I fought with them some years ago."

10. Testifying on behalf of the Respondent was Mr. Cravero, who indicated that ninety-eight percent of his customers do not pay within the required ten-day period (Tr. 77); and, that he believed that he had a better chance of getting paid if the Respondent were allowed to continue in business. The testimony of Mr. Danna, of the Select Tomato Company, was to the same effect (Tr. 86).

11. Mr. Regoli, President of International Ag., and Respondent's largest creditor, testified, pursuant to subpoena, that Government employees took 10-12 hours of his time in obtaining his records which pertained to Respondent; that ninety per cent of his customers went beyond ten days for payment (Tr. 55); and, that his company had an "open account" with Respondent (Tr. 63). He also testified as follows:

"Q. If they revoke the license, you are fearful for the money; is that right?

A. That's right.

Q. It would be prejudicial to all the creditors if American Fruit Purveyors' license was revoked?

A. I believe it would be to the benefit of all the creditors, you know, to keep American Fruit operating."

(Tr. 58, 59).

12. Mr. Sturm described Respondent's payment practices thusly:

"\* \* \* A. I never made any purchases that I intended to pay in ten days.

I just kept paying bills as they came in.

Q. Did you feel that you would have the finances to pay within twenty days?

A. I kept paying the bills as they came in, as fast as we could, until the Department interrupted the flow of the funds.

The Department is the one that caused this whole transaction.

Q. Did you, at any time, have an express agreement with any of your sellers to pay at a time later than ten days?

A. My express agreement was an implied contract after doing business for forty years in the same manner, just as rent is due on the first, you pay on the 15th, \* \* \* \* \*  
My agreement was when they called for money, I pay, and that is the testimony you heard. \* \* \*".

13. Respondent waived "any defense as to interstate or intrastate" distinction (Tr. 10), and, stipulated "as to the authenticity of invoices" (Tr. 12, 31).

14. Paragraph 6 of the Complaint sets forth 316 transactions, from 15 sellers, wherein it is alleged that the Respondent, during the period November, 1980, through June, 1981, purchased lots of perishable agricultural commodities in interstate commerce, which commodities were received and accepted by Respondent, but for which, Respondent failed to make full payment promptly of the agreed purchase prices, or balances thereof. The record evidence does not dispute this allegation.

15. The acts of Respondent in failing to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities it purchased, as alleged in paragraph 6 of the Complaint, constitute

willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act, as interpreted and implemented by the Department of Agriculture.

16. Notwithstanding that the Respondent's payment practices do not coincide with the statutory requirements, and the Department's regulations, the evidence of record nevertheless shows that Mr. Sturm is regarded as a man of integrity, and one with a sincere desire to do what is right, as evidenced by the fact that his creditors attempted to work out a payment plan, and, that they still did business with him.

#### CONCLUSIONS

This case involves a Respondent who has been in the produce business for a period of approximately forty-four years. During the years 1979-1980, the Respondent did a volume of business approximating \$10 million. That volume subsequently dropped to approximately \$2-4 million. As herein pertinent, the nature of the Respondent's business was to service hotels and restaurants and other customers that required produce on a daily basis. He employed approximately 26 employees and utilized approximately 6-8 trucks or other vehicles in his business.

The Respondent believes that the Department of Agriculture has proceeded to act discriminatorily and arbitrarily with respect to him. He indicated that he believes that he has been treated with vindictiveness and that his situation is a hatchet job. (Tr. 189). In furtherance of this contention, the Respondent points out that in the Miami area, there are very few who pay within the ten day period, and, that they still have licenses; that his creditors continue to do business with him; that his pattern of payment constituted an implied contract to pay late; and, that his credit book rating was not good, and his suppliers were on notice (Tr. 214, 216, 223). These and other contentions of the Respondent have been duly considered. However, in view of the record evidence, which fails to disclose full, or even partial payment (although this was asserted), of the sums alleged to be due and owing in paragraph 6 of the Complaint, the Administrative Law Judge has no discretion but to accept the Department's recommendation of revocation of the Respondent's license. Whether a license is to be revoked, suspended, held in abeyance or otherwise, are discretionary matters of authority lodged with those who administer the Act. In this case, there has been no showing, on the facts of record, that the Department of Agriculture has acted illegally in exercising this discretionary authority with respect to the right of the Respondent to keep and maintain its license.

The Department's position is explicitly set forth in its decided cases, such as: *In re: United Fruit and Vegetable Co., Inc.*, PACA Docket No. 2-5536, April 3, 1981, wherein it is stated among other things:

"A violation is flagrant, *inter alia*, if it involves a substantial sum of money or it results from a licensee entering into transactions knowing that its financial condition is such as to make violations likely.

It would not be a mitigating circumstance to explain unexpected events that contributed to respondent's inability to make full payment. Many excuses are offered in failure to pay cases as to why payment could not be made, e.g., bankruptcy, another firm failed to pay the violator for produce, or an unusual situation occurred such as a strike or fire, but all such excuses are routinely rejected in determining whether a violation occurred or whether the violation was wilful since "the Act calls for payment—not excuses." [Footnotes omitted.]

Another more recent case is the proceeding of *In re: Produce Brokers, Inc.*, having PACA Docket No. 2-6081, wherein it was stated in "Ruling on Certified Questions", November 8, 1982, that "\* \* \* 'the Act calls for payment—not excuses.' " Similarly, all excuses as to why payment

5—Footnote to *Produce Brokers, Inc.*,

*In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982), (non-payment because of financial difficulties and respondent's bank froze its bank account), *appeal docketed*, No. 82-1843 (D.C. Cir. July 26, 1982); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (non-payment because of bankruptcy of another firm owing respondent \$776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (non-payment because of financial difficulties), *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit and Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (non-payment because of financial difficulties), *aff'd*, No. 81-1554 (8th Cir. Jan. 21, 1982), *cert. denied*, 50 U.S.L.W. 3944 (U.S. June 1, 1982) (No. 81-1930), *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord*, *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *appeal docketed*, No. 81-4397 (5th Cir. Sept. 29, 1981); *In re C. B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, No. 81-2197 (3d Cir. Mar. 29, 1982), *cert. denied*, No. 81-2207 (Oct. 4, 1982), *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (non-payment because of fi-

was not made promptly are routinely ignored since "the Act calls for payment—not excuses." <sup>6</sup>

"Although mitigating circumstances are generally considered in determining sanctions in the Department's disciplinary cases, all excuses as to why payment was not made have been disregarded in determining the sanction in cases involving failure to pay under the Perishable Agricultural Commodities Act in view of the statutory provisions and the nature and history of the program. *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). For the reasons set forth in *Esposito*, there are no mitigating circumstances suggested by this record that would reduce the sanction for failure to pay \$329,224.21 in 44 transactions over a nine-month period."

Also, among Respondent's arguments is that it never, at any time, willfully, flagrantly, and repeatedly violated any of the provisions of PACA. As Complainant notes on brief, the Department's interpretation of wilfulness is that a violation is wilful "if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *American Fruit Purveyors v. United States*, 630 F.2d 370 (5th Cir. 1980); *Henry S. Shatkin* 34 A.D. 296 (1975); and, *G. Steinberg & Son*, 32 A.D. 236, aff'd 491 F.2d 988, cert. den. 419 U.S. 830 (1974).

Premised upon the evidence of record, and the case law of the Department, I have no alternative but to issue an order revoking the license of the Respondent.

#### ORDER

The license of the Respondent, American Fruit Purveyors, Inc. is revoked.

All motions, requests or otherwise, not specifically ruled upon and which are inconsistent with this Decision are hereby denied.

financial difficulties), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978), *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over \$130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties), *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (non-payment because of financial difficulties).

6—Footnote to Produce Brokers, Inc.

"*In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re L. R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975), *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975)."

This Decision and Order will become final 35 days after service hereof unless appealed within 30 days in accordance with the Rules of Practice and Procedure (7 C.F.R. §1.130 *et seq.*).

Copies hereof shall be served upon the parties. [The Decision and Order became final on February 18, 1983.—Ed.]

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(No. 22,340)

*In re* PETE SINGH PRODUCE, INC. PACA Docket No. 2-6118 Decided  
December 28, 1982.

**Failure to make full payment promptly—Violations, of Section 2 of the  
Act—Valid defense, failure to raise—License, revocation of**

Respondent's failure to make full payment promptly with respect to 28 lots of fruit and vegetables constitutes wilful, flagrant and repeated violations of the Act for which respondent's license is revoked

*Dennis Becker*, for complainant.

*Bruce J. Ponder*, El Paso, Tex., for respondent

*Decision by Victor W. Palmer, Administrative Law Judge.*

#### DECISION AND ORDER

##### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on September 24, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during the period February 1981 through April 1982 respondent purchased from five sellers, and accepted in interstate and foreign commerce, 28 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$115,267.24. Complainant further alleged that such actions were wilful, flagrant and/or repeated violations of section 2 of the Act, and requested that respondent's license be revoked.

On October 20, 1982, respondent filed an Answer in which it admitted the factual allegations of the complaint, denied that the violations were wilful, flagrant or repeated, and raised as a defense the fact it is in bank-

ruptcy. Complainant subsequently moved for a Decision On The Pleadings and attached a copy of the Judicial Officer's "Ruling on Certified Questions," *In re: Produce Brokers, Inc.*, Docket No. 2-6081, November 8, 1982. The Judicial Officer's ruling, which is perforce controlling, requires entry of a decision without a hearing when the admitted facts show that the holder of a PACA license has repeatedly failed to pay large sums to sellers of produce. Such facts are admitted here. Complainant requests that the license, which is next subject to renewal on February 8, 1983, be revoked consistent with the Judicial Officer's holdings, as in *Produce*, that violations of this type are to be construed as wilful, call for the sanction of revocation as specified by Congress, and are not susceptible to mitigation through proof of circumstances of the type respondent would assert.

In accordance with *Produce*, respondent's PACA license is hereby revoked on the basis of the following findings of fact and resultant conclusions of law.

#### FINDINGS OF FACT

1. Respondent, Pete Singh Produce, Inc., is a Texas corporation whose address is Post Office Box 83, El Paso, Texas 79941.

2. Pursuant to the licensing provisions of the Act, license number 711072 was issued to respondent on February 8, 1971. This license was renewed annually, and is next due for renewal on February 8, 1983.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in paragraph 5 of the complaint, during the period February 1981 through April 1982, respondent purchased from five sellers, and accepted, in interstate and foreign commerce, 28 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$115,267.24.

#### CONCLUSIONS

The acts of respondent in failing to make full payment promptly constitute wilful, flagrant, and repeated violations of section 2 of the Act. (7 U.S.C. 499b). Respondent has failed to raise a valid defense to these violations. Accordingly, the following Order is issued.

#### ORDER

Respondent's license is revoked.

This Decision and Order shall take effect on the 11th day after this Decision become final.



Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties. [The Decision and Order became final on February 7, 1983.—Ed.]

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(No. 22,341)

*In re* DILLARD MAURICE MARKHAM d/b/a MARKHAM FRUIT CO. P'ACA  
Docket No. 2-6128. Decided January 7, 1983.

**Failure to make full payment promptly—Publication of facts—Default**

Respondent's failure to make full payment promptly with respect to 27 sellers for 193 lots of perishable agricultural commodities he purchased and accepted constitutes willful, flagrant and repeated violations of the Act. The facts and circumstances set forth shall be published.

*Andrew Y. Stanton*, for complainant

*Decision by Victor W. Palmer, Administrative Law Judge.*

**DECISION AND ORDER**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 8, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1981 through February 1982, respondent purchased and accepted, in interstate and foreign commerce, from 27 sellers, 193 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$254,499.68.

A copy of the complaint was served upon respondent on October 15, 1982, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

### FINDINGS OF FACT

1. Respondent, Dillard Maurice Markham d/b/a Markham Fruit Co., is an individual proprietorship, whose address is Route 1, Box 383, Lynchburg, Virginia 24502.

2. Pursuant to the licensing provisions of the Act, license number 145232 was issued to respondent on May 12, 1953. This license was renewed annually, but terminated effective April 1, 1982, when respondent was discharged under Chapter 7 of the Bankruptcy Code (11 U.S.C. 701 *et seq.*), in the United States Bankruptcy Court for the Eastern District of Virginia, filed February 5, 1982, Case No. 682-00084.

3. As more fully set forth in paragraph 5 of the complaint, during the period July 1981 through February 1982, respondent purchased and accepted in interstate and foreign commerce from 27 sellers, 193 lots of fruit and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$254,499.68.

### CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 193 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

### ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties. [The Decision and Order became final on February 15, 1983.—Ed.]

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(No. 22,342)

*In re* KENNETH M. CAPPS d/b/a KENNETH CAPPS PRODUCE, PACA  
Docket No. 2-6134. Decided January 14, 1983.

**Failure to make full payment promptly—Violations, of section 2 of the  
Act—License, revocation of—Default**

Respondent's failure to make full payment promptly with respect to 19 sellers for 86 lots of perishable agricultural commodities it purchased and accepted constitutes wilful, repeated and flagrant violations of the Act for which respondent's license is revoked

*Edward M. Silverstein*, for complainant.

*Decision by John G. Liebert, Administrative Law Judge.*

**DECISION AND ORDER**

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 19, 1982, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1981 through July 1982, respondent purchased and accepted, in interstate and foreign commerce, from 19 sellers, 86 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make fully payment promptly of the agreed purchase prices or balances thereof in the total amount of \$141,537.05.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

**FINDINGS OF FACT**

1. Respondent, Kenneth M. Capps, is an individual doing business as Kenneth Capps Produce, whose business is 411 S. Goldsboro Street, Wilson, North Carolina 27893.

2. Pursuant to the licensing provisions of the Act, license number 741099 was issued to respondent on January 18, 1974, was renewed an-

nually, presently is in effect, and is next subject to renewal on or before January 18, 1983.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1981 through July 1982 respondent purchased and accepted in interstate and foreign commerce from 19 sellers, 86 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$141,537.05.

#### CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 86 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

#### ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties. [The Decision and Order became final on February 23, 1983.—Ed.]

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(No. 22,343)

*In re* OLD VIRGINIA, INC. PACA Docket No. 2-5938. Decided February 22, 1983.

Failure to pay—Violations, of Section 2 of the Act—License, revocation  
of—Publication of facts

Respondent's failure to pay 15 sellers for 82 lots of perishable agricultural commodities it purchased, received and accepted constitutes wilful, flagrant and repeated violations of the Act for which respondent's license is revoked. The facts and circumstances set forth shall be published.

*William J. Weber, Administrative Law Judge*

*Edward M. Silverstein, for complainant*

*Dale A. Davenport, Harrisonburg, Va., for respondent.*

*Decision by Donald A. Campbell, Judicial Officer.*

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge William J. Weber filed an initial decision and order on December 30, 1982, revoking respondent's license for failure to pay 15 sellers \$145,140.87 for 82 lots of produce purchased and accepted in interstate commerce during the nine month period from August 1980 through May 1981.<sup>1</sup>

Judge Weber suspended the revocation order, however, for the time necessary to accomplish the proposed sale of respondent's business, with the revocation order to be withdrawn, and respondent to retain its license, if the proposed sale were successfully concluded.

On January 5, 1983, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).<sup>2</sup> On February 16, 1983, the case was referred to the Judicial Officer for decision.

<sup>1</sup> See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 4 (1981 and May 1982 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, *Agricultural Law*, ch. 72 (1980 and May 1982 Supp.).

<sup>2</sup> The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation, 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

For the reasons set forth below, I agree with complainant that respondent's license should be revoked irrespective of any sale of its business.

#### FINDINGS OF FACT

1. Respondent is a Virginia corporation whose address is West Sixth Street Extension, Front Royal, Virginia 22630. It has been licensed under the Perishable Agricultural Commodities Act since May 1939. The last annual license renewal date was May 11, 1982.

2. During the nine month period from August 1980 through May 1981, respondent purchased, received and accepted 82 lots of perishable agricultural commodities from 15 sellers in interstate and foreign commerce, but failed to pay the agreed purchase prices totalling \$145,140.87. The full amount of such purchases remains due and unpaid.

3. On June 8, 1981, respondent filed a petition pursuant to Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Western District of Virginia.

4. The acts of respondent in failing to make full payment of the agreed purchase prices for 82 lots of perishable agricultural commodities it purchased, received and accepted, as more specifically alleged in paragraph 5 of the complaint, constitute wilful, flagrant and repeated violations of § 2 (4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499 (b) (4) ).

#### CONCLUSIONS

Respondent's attorney states in a letter to Judge Weber dated January 12, 1983:

In accordance with the order entered in this case, I regretfully must represent on behalf of Thomas J. Chandler, Jr., Trustee, that the negotiations for the sale of Old Virginia, Inc., described in testimony given in the hearing, have failed to result in a sale. At this time, it appears extremely unlikely that a sale will be obtained upon terms requiring the retention of the PACA license.

Respondent filed no other response to complainant's appeal, and respondent has, accordingly, abandoned its defense to complainant's appeal. Since the negotiations for the sale of the corporation were unsuccessful, respondent's license should now be revoked under Judge Weber's order.

However, even if respondent had been able to effectuate a sale of its business, Judge Weber's order would have been reversed, and respondent's license would have been revoked, under the Department's settled policy.

Under the settled policy of this Department, sustained on judicial review in many cases, respondent's license should be revoked for the wilful, flagrant and repeated violations involved here. *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), and cases cited therein, *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982).

Judge Weber would have imposed no sanction against respondent if the sale of its business had been effectuated so that part or full payment could have been made to the 15 sellers involved in respondent's violations. Respondent had a "net operating loss carry forward" of close to one and one-half million dollars, which was expected to produce \$750,000 in Federal and State income tax benefits to a purchaser, if respondent's license were not revoked (Initial Decision 6A). Respondent's creditors supported its effort to have its license retained so that they might receive part or full payment of their claims.

However, this Department routinely ignores requests for leniency from creditors of a violator since they have a strong motive for wanting the violator to continue in business (hoping that repayments will be made), but the Department must consider the broader public interest, involving thousands of shippers and suppliers throughout the country. *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n. 6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

As explained in *Beene* and numerous other decisions, where there are repeated and flagrant payment violations of the magnitude involved here, revocation of the violator's license is necessary to serve as an effective deterrent to respondent and other potential violators.

Respondent's attorney concedes in his original brief, page 8, that respondent's violations were—

entirely and exclusively the result of mismanagement of the corporation by certain persons who were in control of the corporation. . . . The mismanagement was fraudulent and intentional and was the proximate cause of the alleged nonpayments set forth in the Complaint.

Under Judge Weber's order, those persons (and others of a like mind) would be free to attempt to victimize another produce business, possibly

resulting in further failures to pay, with no adverse consequences to the guilty individuals.

Respondent argued in its original brief, pages 8-13, that the corporate veil should be pierced, and that an order should be issued only against the guilty individuals who managed the corporation, rather than against the corporation.

However, the "doctrine of piercing the corporate veil is a sword—not a shield." *In re Casca*, 34 Agric. Dec. 1917, 1933 (1975). It may be used to prevent a person from using the corporate fiction as a shield to escape the statutory penalty for misconduct, but not to protect a person (individual or corporate) from the statutory penalty for misconduct. *Id* 1930-33.

Furthermore, even if the Department were willing to issue an order against the individuals responsible for the violations and not against the respondent corporation, there is no statutory authority for such action. Under the Perishable Agricultural Commodities Act, if a sanction is not imposed against the respondent corporation, the individuals responsible for the violations escape without any sanction.

For the foregoing reasons, respondent's license should be revoked.

#### ORDER

Respondent's license is revoked.

The facts and circumstances as set forth herein shall be published.

This order shall take effect on the 30th day after service thereof on the respondent.

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MISCELLANEOUS ORDER ISSUED BY  
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,344)

*In re* VEG-PRO DISTRIBUTORS. PACA Docket No. 2-6063. Order issued February 4, 1983.

#### REMAND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Administrative Law Judge William J. Weber issued a default decision and order on December 2, 1982.



On December 14, 1982, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).

The complaint was served on respondent by certified mail on two occasions, but each letter was returned by the post office as undeliverable, with a notation, "Box Closed — No Order." Later, the complaint was sent to respondent by regular mail, but this letter was also returned by the post office as undeliverable, with the notation, "Not Deliverable As Addressed, Unable To Forward."

Respondent was not a licensee when service of the complaint was attempted since respondent's license lapsed on November 28, 1981, because of failure to pay the required annual license fee.

Inasmuch as respondent was not a licensee when service of the complaint was attempted, and the record shows that respondent in fact never received service of the complaint, the default decision and order should be vacated and the proceeding remanded to the Administrative Law Judge for further proceedings, in order to assure Due Process.

#### ORDER

The decision and order previously filed in this proceeding is vacated.

This proceeding is remanded to the Administrative Law Judge for further proceedings.

The Hearing Clerk is directed to re-serve the complaint on respondent.

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REPARATION DECISIONS

(No. 22,345)

YAKIMA FRUIT & COLD STORAGE CO. v. INTERNATIONAL A. G.,  
INC. PACA Docket No. 2-6104. Decided February 9, 1983.

**F.o.b. sale—Suitable shipping condition warranty, breach of—Damages,  
not shown—Claim for lost profit, denied—Reparation awarded**

Where respondent received a truckload of apples under protest from complainant, it is found complainant breached the warranty of suitable shipping condition, since the apples could not withstand normal transportation services and conditions. Since respondent has not shown it suffered any damages and since the value of the apples at the time of delivery exceeded the cost of the apples, respondent is obligated to complainant for the full contract price.

*Edward M. Silverstein*, Presiding Officer.

Complainant, *pro se*.

*C. Peter Buhler*, Miami, Fla., for respondent

*Decision by Donald A. Campbell, Judicial Officer.*

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought reparation against respondent in the amount of \$41,635 in connection with three transactions, in interstate and foreign commerce, involving apples. During the course of this proceeding respondent paid complainant, as an undisputed amount, the sum of \$32,398.79. In addition, complainant acknowledged that \$5,000 worth of fruit was diverted to another customer. Thus, only \$4,236.21 remains in dispute.

A copy of the Department's report of investigation was served on each of the parties. Respondent was, also, served with a copy of the formal complaint and filed an answer thereto denying any further liability to complainant.

Although the amount originally claimed as damages exceeded \$15,000, the parties waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CF §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of verified statements and complainant filed an opening statement. Neither party filed a brief.

## FINDINGS OF FACT

1. Complainant, Yakima Fruit & Cold Storage Co., is a corporation whose mailing address is P.O. Box 91, Yakima, Washington 98907.

2. Respondent, International A. G., Inc., is a corporation whose mailing address is 1930 N.W. 23rd Street, Miami, Florida 33142. At all material times, respondent was licensed under the Act.

3. On or about April 16, 1982, in the course of interstate and foreign commerce, complainant sold respondent two carloads and one truckload of apples as follows:

T&T Truck:	1050 XF Tray Pack CA Red Delicious 100's
UPFE 45891	500 Fcy Tray Pack CA Red Delicious 100's 1500 Fcy Tray Pack CA Red Delicious 113's
UPFE 45842	989 Fcy Tray Pack RS Red Delicious 125's 1013 Fcy Tray Pack CA Red Delicious 138's

4. The two carloads of apples, UPFE 45891 and UPFE 45842, less the \$5,000 worth of apples which complainant diverted to another customer, have been paid for in full and are no longer in dispute.

5. Respondent has paid complainant \$7,336.29 with respect to the load of apples carried on the T&T Truck.

6. Complainant invoiced respondent, in pertinent part, as follows for the truckload of apples:

INVOICE NO. 2505  
INVOICE DATE 4/20/82  
CAR NUMBER/TRUCK  
NAME T&T Truck  
DATE SHIPPED 4/16/82

## ROUTING

FOB YAKIMA

NO. PKGS	GRADE & PACK	VARI- ETY	BRAND	SIZES	PRICE	AMOUNT
1050	TRAY CTN XF	CA RED DEL	SMART APPLE	100's	\$1.00	11,550 00
RYAN THERMOMETER CHARGE				RYAN R273414		22.50
CHART 82083						
CERTIFICATE K-63671A						
TOTAL						11,572.50

7. On April 16, 1982, at 2:15 p.m., an inspection was completed of apples designated as lot number E214082 at complainant's location. Inspection Certificate No. K63671A was issued. In pertinent part, the certificate reflects as follows:

Products.

APPLES

*Red Delicious*, 2100 tray pack cartons, APPLE TOWN BRAND  
Size 100's noted Approx 90% show 90% to full red color. Grade defects average within tolerances. Generally firm ripe, few firm. Less than 1% decay and internal breakdown U.S. EXTRA FANCY.

Pack Meets U.S. Condition Standards for Export

Containers stamped WN CA 160.

Grade: Meets the Requirements of Export Apple and Pear Act.

8. On April 16, 1982, Phytosanitary Certificate No. 65630 was issued for 2100 cartons Red Delicious apples, Smart Apple Brand, designated State Lot No. E214082.

9. On April 21, 1982, at 7:00 a.m., the truckload of apples was inspected at respondent's place of business and Certificate No. E168690 was issued. In pertinent part, the Certificate provides as follows:

Condition  
of Equipment Temperature Control Unit Not In Operation.

Products

Inspected: APPLES in tray pack telescope type cartons branded 'Smart Apple, Dist by Yakima Fruit & Cold Storage Co., Yakima, WA., One Volume Bushel, U.S. Extra Fancy stamped 'Red Delicious WNCA 160, 100 Size, Wash Dept. of Agri E214-082.'

APPLICANT STATES: 1050 Cartons

Condition  
of Load: Through Lengthwise load 6 Rows 6 to 7 Layers.

Condition  
of Pack: Fairly Tight

Temperature  
of Product: Various Locations 36°F to 37°F

Size Fairly uniform.

Quality: Clean, fairly well formed. 75 to 100%, Mostly 85 to 95%, good red color. Grade defects average 5%, Misshappen.

Condition: Firm. 5 to 32%, average 20% injury including 10% damage by bruising, scattered throughout pack and lot No decay in most, 1% in many, 4% in few, average less than 1% decay. Irregular decay occurring in lot number W16B19.

Grade: U.S. Extra Fancy, bruising being a factor of condition in few samples. Fails to meet U.S. Condition standards for export account bruising.

Remarks: Load made accessible by applicant for unrestricted inspection

10. Immediately after the inspection, respondent contacted the broker who arranged the sale, Mr. John M. Baum, Atlantic Beach, Florida, and advised him that respondent "received the apples under protest." Additional contacts were made with Department of Agriculture officials.

11. Respondent renegotiated its resale contractual arrangements with its Venezuelan customer as to 995 of the 1050 boxes but did not need to renegotiate such arrangements as to the remaining 55. From its customer, respondent received at least \$16,666.25. Its freight costs were \$4,656.60 for ocean freight, and \$2,736.25 for trucking the apples overland.

12. A formal complaint was filed on May 25, 1982, which was within nine months of when the cause of action stated herein accrued.

### CONCLUSIONS

Respondent admits receiving the only load of apples left in contention. Having received the load, respondent is obligated to complainant for the full contract price less damages resulting from any breach of contract by complainant. *Rocky Ford Dist. Co. v. Angel Produce*, 29 Agric. Dec. 93 (1970). The respondent has the burden of proof as to such matters. *The Growers-Shipper Pot. Co. v. Southw. Pro. Co.*, 28 Agri. Dec. 511 (1969).

As proof of complainant's breach of contract, respondent submits the destination point inspection certificate which reflects the results of an unrestricted inspection and in which the apples were found unfit for export because of excessive bruising. Specifically, the inspector reported that the apples had "5 to 32%, average 20% injury including 10% damage by bruising \* \* \*." Complainant counters respondent's evidence with a shipping point inspection in which no bruising damage is reported. It argues that since this was an f.o.b. Yakima sale and since the apples made grade on loading, there was no breach of contract by it.

While complainant is correct that, in an f.o.b. sale, title passes to a buyer once the produce is loaded on board the means of transporting it, in this case a truck, the seller is required to put the product on the truck in suitable shipping condition. *Gilbert Orchards v. Ranalli Enterprises*, 30 Agric. Dec. 952 (1971); 7 CFR 46.43 (j). Such a warranty of suitable shipping condition is applicable unless the shipment was not handled under normal transportation services and conditions. If a shipment is handled normally, the shipper is liable for any abnormal deterioration at contract destination while a receiver is responsible for intransit damage if there are abnormal transportation services and/or conditions. *Wolf v. Mendelson-Zeller Co.*, 34 Agric. Dec. 690 (1975).

There is no evidence of abnormal transportation services or conditions here. The trip from Washington to Florida lasted approximately four days, temperatures appear to have been normal, and there is no evidence of, nor even allegation of, mistreatment. Yet, the destination inspection revealed excessive deterioration. We must conclude that the apples on the T&T Truck, therefore, were not in suitable shipping condition and that complainant breached its contract with respondent by shipping apples which could not withstand the rigors of normal transportation service and condition. It is noted in this regard that the apples were shipped from storage, and that they had probably been stored for 4-5 months. Further it is noted that they were found to be "firm ripe, few firm" on the shipping point inspection. It follows from this that the apples were probably too ripe to withstand normal cross-country shipment. Moreover, the term of contract which is used when the terms of sale are as described by complainant is "f.o.b. acceptance final." That term is defined in the Regulations as follows:

[7 CFR §46.43] Terms construed.

★ ★ ★ ★ ★ ★ ★

(m) 'f.o.b. acceptance final' or 'shipping point acceptance final means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term.

But this was not the term of sale here. The term of sale here was "f.o.b." and the complainant was, therefore, required to place the goods on board the truck in suitable shipping condition. As noted above complainant breached this part of its contract with respondent.

Having established complainant's breach, respondent is entitled to a reduction in the contract price by the amount of provable damages. The measure of damages upon failure of goods to meet contract requirements is the difference between the value of the produce at the time of delivery and the value the produce would have had at that time if it had met the contract specifications. U.C.C. §2-714. In the absence of other evidence the f.o.b. contract plus freight will be accepted as the value of the produce at the time it made delivery had complainant not breached its contractual obligation, and the proceeds from a prompt and proper resale by the buyer will be accepted as the value of the apples at the time of delivery. *Norfolk Banana v. Standard Fruit*, 34 Agric. Dec. 413 (1975).

In this instance respondent has not shown that it suffered damages. The contract price for the apples in question was \$11,572.50 and the freight cost from Washington to Florida was \$2,736.25. The value of the goods had the apples been as warranted was, therefore, \$14,308.75. The

value of the goods received was at least \$16,666.25, the proceeds from respondent's prompt resale.<sup>1</sup> This amount should not be reduced by respondent's claimed handling charge of 40¢ per box because respondent failed to submit any proof as to this cost. Moreover, respondent's claim of a 13% commission is denied as unwarranted in these circumstances, and respondent's claim of ocean freight in the amount of \$4,656.60 is denied as not attributable to complainant's breach. Since the value of the apples at the time of delivery (\$16,666.25) exceeded the cost of the apples (\$14,308.75), respondent is obligated to complainant for the full contract price, or \$11,572.50. Having paid complainant \$7,336.29, respondent is obligated to complainant in the amount of \$4,236.21. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act, (7 U.S.C. 499 (b)), for which reparation plus interest should be awarded.

It is noted that respondent's claim of damage implicitly, if not explicitly, includes a claim for lost profit. Such a claim is denied because there is no proof that respondent's terms of resale were disclosed to complainant at the time it sold the apples to respondent. Consequently respondent's lost profits were not within the contemplation of the parties. *S. P. Lipoma Co. v. C. H. Robinson*, 29 Agric. Dec. 499 (1970).

#### ORDER

Within thirty days from the date of this order, respondent shall pay complainant \$4,236.21 as reparation, plus interest in the amount of 13% per annum from June 1, 1982, until paid.

Copies of this order shall be served upon the parties.

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<sup>1</sup> Evidently, respondent was able to handle 55 of the 1,050 boxes normally, but has not reported the proceeds from such a sale.

(No. 22,346)

GENBROKER CORPORATION a/t/a GENERAL BROKERAGE COMPANY v.  
BRONIA INC a/t/a J & J PRODUCE. PACA Docket No. 2-6037. De-  
cided February 14, 1983.

F.o.b.a.f. basis—Suitable shipping condition warranty, not  
applicable—Merchantability, breach of warranty not  
justified—Reparation awarded—Counterclaim, dismissed

Where the subject produce was sold f o.b. acceptance final and a breach of the warranty of merchantability could not be proven, it is found respondent accepted the produce at destination and is therefore liable to complainant for the full purchase price of the produce, minus the amount already paid. Since the counterclaim arose out of the same course of action, it is dismissed.

*George S. Whitten*, Presiding Officer.

Complainant, *pro se*

*Arthur Slavin*, New York, N.Y., for respondent

*Decision by Donald A. Campbell, Judicial Officer.*

#### DECISION AND ORDER

##### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in connection with a transaction involving the shipment of mixed produce in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant and asserting a counterclaim arising out of the same transaction. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor the counterclaim exceeds \$15,000 dollars. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence herein, as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Neither party filed a brief.



## FINDINGS OF FACT

1. Complainant, Genbroker Corporation, is a corporation also trading as General Brokerage Company, whose address is 608 E. 9th Street, Los Angeles, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Bronia Inc., also trading as J & J Produce, is a corporation whose address is 257 Row B., N.Y.C. Terminal Market, Bronx, New York. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about October 17, 1981, complainant sold to respondent 114 containers of "Monk" label strawberries at \$11.50 per container, 49 cases of sugar peas at \$22.50 per case; and 10 cases of "Hollywood" label sunchokes at \$11.00 per case, for a total invoice price, including \$30 cartage to the Los Angeles Airport, of \$2,553.50 f.o.b. acceptance final.

4. The mixed produce was delivered to the air carrier at the Los Angeles Airport at 11:20 a.m. on October 17, 1981, and stored in a cooler. At 10:00 p.m. on the same day the produce was transported in a sealed container by air to Kennedy Airport in New York where it arrived at 5:55 a.m. on October 18, 1981. It was picked up at Kennedy Airport sometime during the day of October 18, 1981.

5. On October 19, 1981, at 4:20 a.m. the strawberries were federally inspected at Hunt's Point Market pursuant to the application of respondent. Such inspection revealed in relevant part as follows:

Products Inspected.	STRAWBERRIES in trays branded, "Monk 12 dry pint Baskets. Produce of USA grown and shipped by Monc's Consolidated Produce, Inc Oxnard and Watsonville, CA 95076" Applicant states 114 trays.
Condition of Load:	Stacked at above location
Condition of Pack	Cups well filled
Temperature of Product:	43 to 50°F
Condition:	Berries mostly Ripe and firm Calex's Green color
Decay ranges:	5 to 45%, average 18% Grey Mold Rot in various stages
Remarks:	Applicant states stock unloaded from Eastern Airline Flight, Container Number 2726.

6. Respondent has paid complainant \$1,742.50, leaving a balance due of \$811.

7. The formal complaint was filed on March 4, 1982, which was within nine months after the cause of action herein accrued

### CONCLUSIONS

The parties herein are in sharp conflict as to whether the terms of the contract for the mixed produce were an f.o.b. acceptance final. After considering all of the evidence submitted by both parties we conclude that it was agreed between complainant and respondent that the subject produce be sold on an f.o.b. acceptance final basis.

Respondent contends that even if we find that the contract was f.o.b. acceptance final, the condition of the strawberries as revealed by the federal inspection report at destination shows that the strawberries were not merchantable at time of shipment. Respondent thus seeks to show that there was a material breach of the contract, even though the suitable shipping condition rule does not apply. See 7 CFR 46.43 (m). However, the use of condition at destination to show condition at time of shipment is exactly the function of the suitable shipping condition warranty. See *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 AD 703 (1980). In this case, where the suitable shipping condition warranty is specifically negated by the terms of the contract, we would not be justified in finding a breach of the warranty of merchantability unless condition at destination, in the light of transportation history, were such as to make it self-evident and certain that the commodity was nonconforming at shipping point. In this case we are dealing with one of the most highly perishable commodities covered by the Act. Strawberries require transit at 32°F, and rarely keep more than 10 days after harvest. See *Protecting Perishable Foods During Transport by Motor Truck*, Agriculture Handbook No. 105. The federal inspection at destination showed that the pulp temperature of the subject strawberries was 43° to 50°F. In addition respondent submitted a letter from the cargo claims manager of United Airlines stating that the temperature in the aircraft on which the sealed container was transported would be from 45 to 50°, and that the temperature of the storage facility at Kennedy Airport was 62°. Even though we are dealing with a relatively short period of time, it is impossible under the circumstances for us to say with any certainty that the strawberries were not merchantable when shipped.

Respondent accepted the commodities at destination, and is, therefore, liable to complainant for the full purchase price thereof for \$2,553.50. Respondent has paid complainant \$1,742.50, which leaves a balance of \$811 still due and owing. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Respondent's counterclaim, since it arose out of the same course of action as the complaint, should be dismissed.

## ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$811, with interest thereon at the rate of 13% per annum from November 1, 1981, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

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(No. 22,347)

HOMESTEAD TOMATO PACKING CO., INC. v. BEN E. KEITH COMPANY. PACA Docket No. 2-5945. Decided February 14, 1983.

Existence of contract, failure to prove—Complaint dismissed

Where complainant has failed to meet its burden of proof it sold said tomatoes to respondent, the complaint is dismissed

George S. Whitten, Presiding Officer.

Complainant, *pro se*

Steward David Greenlee, Fort Worth, Tex., for respondent.

Decision by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation, in the amount of \$13,152, in connection with transactions in interstate commerce involving the shipment of various truckloads of tomatoes.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount involved herein does not exceed \$15,000, and therefore the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Complainant did not file an opening statement. Re-

spondent filed an answering statement and complainant filed a statement in reply. Respondent filed a brief.

### FINDINGS OF FACT

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, Ben E. Keith Co., is a corporation whose address is P.O. Box 2628, Fort Worth, Texas. At the time of the transactions involved herein, respondent was licensed under the Act.

3. On or about April 30, 1981, complainant shipped to respondent or respondent's customer, one truckload containing 576 30 pound cartons of size 5x6 "Strano Pride" brand tomatoes and 704 30 pound cartons of size 6x7 "Strano Pride" brand tomatoes.

4. On or about May 3, 1981, complainant shipped to respondent or respondent's customer, one truckload containing 128 30 pound cartons of size 5x6 "Strano Pride" brand tomatoes and 1,152 30 pound cartons of size 6x7 "Strano Pride" brand of tomatoes.

5. On or about May 7, 1981, complainant shipped to respondent or respondent's customer, one partial truckload containing 448 30 pound cartons of size 6x6 "Strano Pride" brand tomatoes and 64 30 pound cartons of size 6x7 "Strano Pride" brand tomatoes.

6. The formal complaint was filed on November 20, 1981, which was within nine months after the causes of action alleged herein accrued.

### CONCLUSIONS

Complainant alleges that on or about the dates of May 1, 1981, through May 7, 1981, it sold to respondent the three loads of tomatoes described in the findings of fact. In the sworn complaint, complainant's president Rosario Strano states that the contracts were negotiated by Paul Saladino of C. Saladino & Son, and Tom Banks, salesmen for complainant. Complainant attached copies of the invoices covering the three loads of tomatoes to the complaint. These showed such tomatoes as being sold to respondent, and accurately set forth respondent's Fort Worth address underneath respondent's name. The invoices state that the tomatoes were to be shipped to respondent. Complainant also attached to the complaint copies of shipping point federal inspection reports covering the tomatoes and copies of shipping documents, evidently given to the trucker, which state "sold to Ben E. Keith Co." with respondent's address following.

Respondent, in its answer, denies complainant's contention that the tomatoes were purchased by respondent from complainant and states that the tomatoes were instead purchased by respondent from C. Sala-

dino & Son and that no contracts existed between complainant and respondent. Respondent further stated that C. Saladino & Son was never an agent of respondent but was rather the party from which respondent purchased the tomatoes. Respondent attached to its answer copies of invoices received from C. Saladino & Son showing either the same or approximately the same shipping dates, quantities, brand, and sizes of tomatoes as those covered by complainant's invoices. Respondent also attached to the complaint copies of cancelled checks made out to C. Saladino & Son and issued by respondent or respondent's subsidiary, covering amounts sufficient to pay for the produce for which respondent was billed by C. Saladino & Son.

Before further discussion of the evidence submitted in this proceeding, there is a preliminary matter, raised by respondent, which must be resolved. On June 24, 1982, a few days following the completion of the submission of evidence in this case, respondent's counsel filed a petition to reopen the proceeding to receive further evidence. Respondent's counsel stated in the petition, that in conversations with personnel in the Fort Worth, Texas, office of the Fruit and Vegetable Division of this Department, he learned that the complainant herein also had filed a complaint against C. Saladino & Son. Counsel stated that he then contacted the Hearing Clerk and secured copies of the pleadings in that case (*Homestead Tomato Packing Co., Inc. v. Frances Saladino and Joe Saladino, d/b/a C. Saladino & Son*, PACA Docket No. 2-5937) as well as a copy of an order for payment of an undisputed amount issued in that proceeding. Counsel stated that, on receipt of such pleadings, he learned that the respondent in that proceeding, C. Saladino & Son, had admitted under oath that C. Saladino & Son purchased and took title to the tomatoes which are the subject of the present proceeding.

Complainant filed a reply to the petition to reopen alleging that: \* \* \* if respondent's attorney had studied said evidence presented in PACA Docket No. 2-5937, he would learn that the case against C. Saladino & Son was for seven loads purchased and shipped on different dates and covered by Homestead Tomato Packing invoices numbers 702, 708, 726, 728, 928, 938 and 885 and are in no way part or wholly the same produce as shipped to Ben E. Keith Co. on invoices numbers 832, 883 and 944. These are separate and distinct loads of produce.

The Presiding Officer in ruling against respondent's motion to reopen stated: "Complainant, on July 15, 1982, filed a response to the Petition denying respondent's averments, a copy of which is enclosed for re-

spondent. Inasmuch as a review of the PACA Docket No. 2-5937 file supports complainant, respondent's Petition is denied."

Respondent filed a "Motion To Reconsider Petition To Reopen Evidence" in which it agreed with complainant's allegation that the complaint in PACA Docket No. 2-5937 covered the invoices stated by complainant and that such invoices have nothing to do with the present litigation. However, respondent pointed out that C. Saladino & Son in answering the complaint in PACA Docket No. 2-5937 specifically stated in an affidavit form that invoices numbers 832 and 883 (which are the subject of this proceeding) were purchased by Saladino from complainant.

A review of the file in PACA Docket No. 2-5937 shows that respondent's statements in regard to the answer filed therein are correct. The report of investigation in such file also contains matter which is related to this case. We conclude that both the answer and report of investigation PACA Docket No. 2-5937 should be considered as evidence in this proceeding. Both parties to this proceeding have previously received copies of these documents.

Respondent also filed a "Plea In Abatement" and a motion to dismiss relative to invoices 832 and 883. Respondent's argument appears to be, in part, that since C. Saladino & Son's admission relative to the two invoices in PACA Docket No. 2-5937, formed the partial basis for an order requiring the payment of an undisputed amount in that case, complainant has already judicially recovered payment for such invoices from C. Saladino & Son, and should not be allowed to recover for those invoices herein. The order for undisputed amount was issued under the authority of section 7 (a) of the Act (7 U.S.C. 499g (a) ) which states in relevant part:

If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Secretary under such rules and regulations as he shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Secretary with respect to the undisputed sum.

We are of the opinion that the Secretary only has authority in these proceedings to adjudicate matters as to which there is a timely complaint or counter-claim. In PACA Docket No. 2-5937, there was no complaint or counter-claim relative to complainant's invoices numbers 832 and 833. Consequently, even though respondent's answer admitted liability as to such invoices, along with liability for other invoices which were contained in the formal complaint, and although the order for an disputed amount was issued for the total amount admitted by C. Saladino & Son to be due, such order did not amount to an adjudication that the complainant in PACA Docket No. 2-5937 was due anything on invoices not covered in its complaint. Thus, there has been no adjudication as to invoice numbers 832 or 833.

We turn now to the basic question confronting us in this proceeding, which is whether the evidence supports the allegations of complainant that the tomatoes referred to in the findings of fact were in fact sold to respondent. The burden of proving, by a preponderance of the evidence, that such a sale took place is upon complainant. *Royal Packing Co. v. Grand Prairie Produce Brokerage, Inc.*, 34 Agric. Dec. 1743 (1975). Although the issue is a very close one, we find that complainant has failed to meet its burden of proof, by a preponderance of the evidence, for the following reasons. While complainant issued invoices covering the three loads of tomatoes, complainant nowhere clearly alleged that they were sent directly to respondent, nor did complainant offer proof of the mailing of such invoices. Moreover, although Complainant alleged that the actual sales took place through negotiations between its salesmen, Tom Banks, and Paul Saladino, of C. Saladino & Sons, complainant did not submit an affidavit by Tom Banks relative to such negotiations. Though it is also true that there is no statement in the record from Paul Saladino, respondent did submit sworn affidavits by its buyers, Bob Irwin and James Conway, who both stated that they had conducted all negotiations with C. Saladino & Son for purchases of perishable commodities for respondent and that no other employee or agent of respondent had negotiated with C. Saladino & Son for such purchases and that no agent or employee of respondent had directly or indirectly negotiated or contracted with complainant for the purchase of any perishable agricultural commodities. Bob Irwin and James Conway further stated that their agreement with C. Saladino & Son was that respondent would buy fresh tomatoes from C. Saladino & Son and not through C. Saladino & Son acting as agent for any third party. During the process of the investigation of this matter by the Fruit and Vegetable Division of this Department, the Division received a telegram from C. Saladino & Son stating as follows:

Cite as 42 A.D. 284

IN REFERENCE TO INVOICE NUMBERS 832, 914 and 883 FROM HOMESTEAD TOMATO PACKERS THESE LOADS WERE BOUGHT BY C. SALADINO AND SON FOR BEN E. KEITH COMPANY IN WHICH BEN E. KEITH HAS PAID C. SALADINO AND SON AND IN NO WAY SHOULD BEN E. KEITH OWE HOMESTEAD TOMATO PACKERS FOR THESE LOADS

In addition, we note that the letter sent by complainant to the Department on July 23, 1981, and which constitutes the informal complaint in this proceeding, discloses that complainant may have been looking, at least in part, to C. Saladino & Son for payment of the subject invoices. Such letter states, in relevant part, as follows:

Enclosed please find a formal complaint against Ben E. Keith Co., Fort Worth, Texas, for failure to pay three outstanding invoices.

We have had several conversations with Mr. Paul Saladino, who arranged to have these loads shipped to Ben E. Keith Co., concerning payment of these invoices. We have been assured that payment would be forthcoming. To date no funds have been received. These accounts are now over 60 days past due and we feel Ben E. Keith Co., should be required to pay all invoices in full plus applicable interest. We have been very patient with Ben E. Keith and Mr. Saladino and must now request immediate payment of all outstanding invoices.

The record also discloses that there was a prior course of dealing whereby complainant sold commodities to C. Saladino & Son and respondent purchased commodities from C. Saladino & Son. After carefully considering all of the evidence herein, we conclude, as stated above, that complainant has failed to meet its burden of proving by a preponderance of the evidence that it sold the tomatoes to respondent. Accordingly, the complaint should be dismissed.

#### ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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HOMESTEAD TOMATO PACKING CO., INC. v. C. SALADINO & SON. PACA  
Docket No. 2-5937. Decided February 14, 1983.

**Market protection—Dismissal of complaint**

Where respondent proved it purchased seven truckloads of tomatoes from complainant with a guarantee of market protection, the complaint is dismissed.

*George S. Whitten*, Presiding Officer.

Complainant and respondent, *pro se*

*Decision by Donald A. Campbell, Judicial Officer.*

**DECISION AND ORDER**

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation against respondent in connection with the sale to respondent of seven truckloads of tomatoes in interstate commerce for invoice prices totaling \$73,225.60.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto admitting liability to complainant in the amount of \$69,548.85 in connection with nine truckloads of tomatoes purchased from complainant and denying liability to complainant for the balance claimed. On March 5, 1982, pursuant to the provisions of section 7a of the Act, an order for undisputed amount was issued requiring payment by respondent to complainant of reparation in the sum of \$69,548.85.

Although the amount claimed in the formal complaint exceeds \$15,000, the parties waived oral hearing and therefore the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

**FINDINGS OF FACT**

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent is a partnership composed of Frances Saladino and Joe Saladino, doing business as C. Saladino & Son, whose address is 2737 Beach Street, Tampa, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between April 14, 1981, and May 9, 1981, complainant sold to respondent and shipped to respondent's customer, seven truckloads of tomatoes of various sizes for invoice prices totaling \$73,225.60 f.o.b. The tomatoes were purchased by respondent with a guarantee of market protection from complainant.

4. Complainant, pursuant to its guarantee of market protection, granted respondent reductions in the invoice prices on all but one of the loads of tomatoes. The total amount of such reductions was \$14,336.00, which left a balancing owing of \$58,889.60.

5. The formal complaint was filed on October 9, 1981, which was within nine months after the causes of action alleged herein accrued.

#### CONCLUSIONS

In the formal complaint, complainant alleges that between April 14, 1981, and May 9, 1981, it sold seven truckloads of tomatoes having invoice prices totaling \$73,225.60, to respondent. Respondent does not deny the purchase and acceptance of these tomatoes. However, respondent alleged in its answer that the tomatoes were purchased with the understanding that complainant was giving respondent market protection. Respondent submitted, as exhibits to its answer, copies of the original invoices relative to the seven truckloads of tomatoes showing a total original price of \$73,225.60. Respondent also submitted as exhibits to its answer copies of two additional original invoices, however, there was no complaint or counterclaim as to these invoices. See *Homestead Tomato Packing Co., Inc v Ben E. Keith Company*, PACA Docket No. 2-5945, 41 A.D. \_\_\_\_ (1982) Considering only the seven invoices which formed the basis of the complaint, the reductions claimed by respondent leave only \$58,889.60 due as to the seven invoices. The amount already awarded complainant in our order of March 5, 1982, as a result of respondent's admission in its answer, exceeds this by a substantial amount.<sup>1</sup>

At no point in this proceeding did complainant in any way challenge respondent's allegations relative to the reductions in invoice prices. Respondent had the burden of proving its affirmative defense that ther

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1. The additional \$10,659.25 appeared at the time the Order to pay an undisputed amount was issued to have been related to the transactions in issue here. It subsequently developed it was not. Since that time for appeal of that Order has run, the Order for undisputed amount will not be changed.

was an agreement for market protection and that it is entitled to the specific reductions for market decline, freight and gas charges made pursuant to such agreement. Since respondent's allegations in its sworn answer relative to such agreement and the reduction in charges were not disputed or in any way rebutted by complainant we conclude that respondent has met its burden of proof. Accordingly, the complaint should be dismissed

#### ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

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(No. 22,349)

BIANCHI & SONS PACKING CO. v. KELVIN S. NG d/b/a KIN YIP COMPANY. PACA Docket No. 2-5852. Decided February 23, 1983.

F.o.b. sale—Jurisdiction, lack of—Abnormal shipping condition—Warranty of suitable shipping condition, not applicable—Damages, not entitled—Defense, not raised—Reparation—Dismissal of counterclaim

Where the complaint and counterclaim are dismissed as to two transactions due to untimely filing; where there were abnormal shipping conditions, the warranty of suitable shipping condition is not applicable and respondent is not entitled to damages regarding two other transactions, and where respondent admitted he did not pay complainant and did not raise an affirmative defense, respondent is liable to complainant for the full purchase prices as to the last two transactions. Therefore, respondent is obligated to complainant for the purchase prices of three shipments which compromise complainant's cause of action, and as a result respondent's counterclaim is dismissed.

*Edward M. Silverstein*, Presiding Officer.

*Matthew M. McInerney*, Newport Beach, Calif., for complainant.

Respondent, *pro se*.

*Decision by Donald A. Campbell, Judicial Officer.*

#### DECISION AND ORDER

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award

against respondent in the amount of \$19,539.60 in connection with three transactions involving the shipment of tomatoes in foreign commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. Respondent was also served with a copy of the formal complaint and filed an answer thereto denying liability to the complainant. It also asserted a counterclaim in the amount of \$6,426.47 in connection with one of the same transactions involved in the complaint as well as three transactions not involved therein.

Although the amount alleged in the complaint exceeds \$3,000.00, the parties have waived oral hearing and therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. Additionally, the parties were given an opportunity to submit additional evidence in the form of sworn statements, but neither party did so. Complainant did file a brief.

#### FINDINGS OF FACT

1. Complainant, Bianchi & Sons Packing Company, is a corporation whose mailing address is P.O. Box 190, Merced, California 95340. At the time of the transactions in dispute, complainant was licensed under the Act.

2. Respondent is an individual, Kelvin S. Ng, doing business as the Kin Yip Company, whose mailing address is 3305 West Spring Mountain Rd., Suite 51, Las Vegas, Nevada 89102. At the time of the transactions in dispute, respondent was licensed under the Act.

3. On or about August 5, 1980 through October 29, 1980, respondent bought eight truckloads of Georgia Boy brand green tomatoes f.o.b. Merced, California, from complainant. Both parties understood that the tomatoes were to be shipped to Hong Kong via trucks and steamships operated by Sealand Service, Inc. and the Maesk Line. The following chart summarizes the details of these transactions:

Trans Num- ber	Date Shipped	Complain- ant Invoice No	Quantity Tomatoes	Price	Total (including pallets, car- tons, temper- ature record- er and gassing)	Container #
A.	08-05-80	8855	1056	\$4 00	\$4,940.00	263807 SEAU
B.	09-10-80	9471	1248	\$4 50	\$6,457.20	120621 SEAU
C.	09-12-80	9498	1056	\$4.50	\$5,460.90	262669 SEAU
D.	10-03-80	9625	1056	\$5 00	\$5,996.40	200273 SEAU
E.	10-11-80	9696	1056	\$6.50	\$7,580.40	264939 SEAU
F.	10-24-80	9775	1152	\$4 50	\$5,962.80	5004855 SEAU
G.	10-25-80	9797	1056	\$4.50	\$5,468.40	264765 SEAU
H.	10-29-80	9813	1248	\$4 00	\$5,833.20	120247 SEAU

4. Upon arrival of the shipments identified as shipments A, D, F and H, the tomatoes were accepted by respondents without objection. Although invoiced by complainant for all these shipments, respondent had made payment for only shipment A at the time the complaint was filed.

5. Upon their arrival in Hong Kong, respondent notified complainant that the tomatoes in shipments designated B, C, E, and G, had arrived in a state of decay. As a result, respondent refused to make payment for these shipments as well as shipments, D, F, and H pending receipt of an independent surveyor's reports.

6. Messrs. Wood and Browne, Marine and Cargo Surveyors of Hong Kong, inspected tomato shipments B, C, E and G. The results of these inspections can be summarized, in pertinent part, as follows:

(a) Tomato shipment B arrived in Hong Kong on the vessel **SEA-LAND Commerce V-87** on September 27, 1980. Refrigerator cargo container No. SEAU-120621 contained 1,248 cartons of "GEORGIE BOY" brand tomatoes. The tomatoes were unloaded and an inspection of 982 cartons on September 29, 1980, reflected as follows:

Cartons in large part misshapen and wet stained by juice of rotted contents, 10% random cartons opened and contents examined finding

Contents badly deteriorated, mouldy and softened, rotted and liquefied.

Assessment -

We recommend an overall assessment of 75% allowance on these 982 cartons be accepted.

★ ★ ★ ★ ★ ★ ★

Spear temperatures of the commodity found to be: 72° to 74°F.

*Probable Cause of Deterioration -*

Basic inferior quality of product.

(b) Tomato shipment C arrived in Hong Kong on the vessel SEA-LAND DEFENDER V-7 on September 30, 1980. Refrigerator container No. SEAU-262669 contained 1,056 cartons of "GEORGIE BOY" brand tomatoes. An inspection on October 2, 1980, reflected the following:

Cartons in part misshapen and wet stained by juice of rotted contents. 10% random cartons opened and contents examined, finding -

Contents in part deteriorated, mouldy and rotted.

*Assessment -*

We recommend an overall assessment of 30% allowance on these 1,056 cartons be accepted.

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*Probable cause of deterioration -*

Basic inferior quality of product

(c) Tomato shipment E arrived in Hong Kong on the vessel SEA-LAND EXCHANGE on November 1, 1980. Refrigerator cargo container No. 264939 contained 1056 cartons of "GEORGIE BOY" brand tomatoes. An inspection on November 10, 1980, reflected the following:

Cartons in part misshapened and wet stained by juice of rotted contents. 10% random cartons opened and contents examined, finding: -

Contents more or less deteriorated, mouldy and rotted. Approximately 60% of the tomatoes were found greenish in colour.

Assessment: -

We recommend an overall assessment of 70% allowance on these 1056 cartons be accepted.

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*Probable cause of deterioration: -*

Basic inferior quality of product.

(d) Tomato shipment G arrived in Hong Kong on the vessel SEA-LAND MCLEAN on November 15, 1980. Refrigerated cargo container No. 264765 contained 1056 cartons "GEORGE BOY" brand tomatoes. An inspection on November 20, 1980, reflected the following:

Cartons in part misshapened and wet stained by juice of rotted contents. 10% random cartons opened and contents examined, finding -

Contents in part deteriorated, mouldy and rotted and in part liquified.

Assessment -

We recommend an overall assessment of 75% allowance on these 1,056 cartons be accepted.

★ ★ ★ ★ ★ ★ ★

*Probable cause of deterioration -*

Cargo being affected by a high carrying temperature at some period during transit.

7. The bill of lading for tomato shipment G contained the following statement:

SHIPPED AT SHIPPERS RISK, DUE TO HIGH VOLUME AT RIPENING STATE LIGHT RED AND REDS.

8. A claim was made to the transport company, Sea-Land Service, Inc. as to tomato shipment G because the survey report established that excessive deterioration was probably due to high transit temperature. In a letter dated December 30, 1980, Sea-Land Service, Inc. denied the claim for the following reason:

\* \* \* according to our investigation, this consignment was moved on a shipper's load, storage and count, CY/CY basis. Cargo was carried at the required and requested temperature within the 5 degrees deviation and there was no malfunction on our equipment.

Reconsideration of this view was requested based on the Ryan temperature recording devices inside the van which reflected temperatures of 64°F to 75°F with a total of 48 hours of temperatures exceeding the requested 58°F by 6 to 17°F. Sea-Land again denied the claim informing respondent that the temperature of the container in which the van was carried was recorded by them as 57°F to 62°F with a short time at 66/69°F during an automatic defrost cycle. Sea-Land, in an April 15, 1981, letter also noted the restriction on the bill of lading noted in finding of fact 7 above.

9. Upon receipt of the survey reports and claims, all the reports and claims were sent to the complainant by respondent.

10. A formal complaint was filed on May 14, 1981, which was within nine months after the cause of action alleged herein accrued. The counterclaim was filed on July 21, 1981.

#### CONCLUSION

Complainant alleges that respondent has failed to pay it \$19,539.60 with regard to the three shipments of tomatoes designated as D, E, and F in finding of fact 3, above. Respondent admits its failures to pay for these shipments but claims damages of \$6,426.87 in excess of this amount on four shipments of tomatoes which have been designated as B, C, E, and G in finding of fact 3, above, due to alleged breaches of contracts by complainant. Neither shipment A nor shipment H was noted as a cause of action in either the complaint or counter-claim and there is no need for further discussion of them here.

The Secretary does not have jurisdiction over shipments B and C, as those causes of action accrued on September 10, 1980, and September 12, 1980, the respective shipping dates of those shipments which dates occurred more than nine months prior to July 21, 1981, the date upon which respondent filed its answer. With respect to counterclaims not based on the subject matter of a complaint, as is the case with shipments B and C, such counterclaims must be filed within nine months from the time the causes of action thereof accrued (7 CFR 47.3 (a)). See, also, *B&K Prod. Co. v. Shipper's Service Co.*, 33 Agric. Dec. 701 (1974).



As to the remaining portions of its counterclaim respondent bears the burden of proof. *The Growers-Shipper Pot. Co. v Southwestern Pot. Agric. Dec. 511 (1969)*.

Neither party disputed that the contracts into which the parties entered were f.o.b. Merced, California. Thus, respondent, as the buyer, bears the risk of loss due to intransit damage. *Salinas Lettuce Farms v. Delta Growers & Distributors*, 32 Agric. Dec. 934 (1973). However, if transportation service is proved normal, the seller may be liable for damages resulting from abnormal deterioration at the final destination on the grounds the goods were not in suitable shipping condition when sold. *Harry Wolf v. Mendelson Zeller Co.*, 34 Agric. Dec. 142 (1975); see, also, 7 CFR 46.43 (j).

The tomatoes in shipments E and G showed excessive deterioration upon arrival in Hong Kong. Complainant as the seller in an f.o.b. transaction has the responsibility to load a product which, given normal transportation conditions and services, would arrive in good condition at its known final destination. See *Ruskowski v. Prevor Mayrsuhn, Inc.*, 34 Agric. Dec. 410 (1981). Therefore, since complainant knew the tomatoes were being shipped to Hong Kong, complainant had a duty to fulfill an implied warranty of supplying tomatoes in suitable shipping condition so as to arrive there in good condition.

Insofar as concerns shipment E, while the inspectors found that the probable cause of deterioration was the "basic inferior quality of product," the inspection did not take place until nine days after the tomatoes arrived and, in addition, the inspection reflected evidence of abnormal shipping conditions to wit: even upon being inspected on November 1, 1980, or 37 days after shipment, 60% of the tomatoes showed "greening in colour." Since green tomatoes shipped under normal conditions would not remain green that long, we conclude that there was abnormal shipping conditions as to this shipment, most likely abnormal temperature. In view of this, the warranty of suitable shipping condition is not dischargeable here. *Anthony Abbate Fruit v. Gianukos-Mandolini*, 31 Agric. Dec. 142 (1972). Thus respondent is not entitled to damages, and is obligated for the full contract price.

Insofar as concerns shipment G, the inspector has found that the probable cause of damages was "a high carrying temperature at some point during transit." The evidence indicates that the problem was not in the shipping container but rather in the van in which the tomatoes were loaded. However, wherever the problem was, it is clear that there were abnormal shipping conditions here. Since there were abnormal shipping conditions, complainant's warranty of suitable shipping condition is nullified. *Six L's v. Sloan*, 29 Agric. Dec. 615 (1970). Thus, respondent

would be obligated to complainant for the full contract price. It therefore is not entitled to any damages as to this shipment.

Insofar as shipments designated D and F are concerned (See finding of fact No. 4), respondent admits that it has not made payment to complainant and, in addition, raises no affirmative defenses. Therefore, respondent is liable to complainant for the purchase prices of those shipments for a total of \$11,959.20.

We find, therefore, that respondent has violated section 2 of the Act and is obligated to complainant for the full purchase prices of the three shipments which compromise complainant's cause of action, (shipments D, E, and F), or \$19,539.60.

In view of our findings, respondent's counterclaim should be dismissed.

#### ORDER

Within thirty (30) days from the date of this order, respondent shall pay to complainant, as reparation, \$19,539.60 with interest thereon at the rate of 13% per annum from November 1, 1980, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

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(No. 22,350)

M. J. DUER & COMPANY v. CHANDLER-TOPIC CO., INC. PACA Docket  
No. 2-6083. Decided February 23, 1983.

Acceptance—Proof, unconvincing—Price reduction, agreed due to  
inspection certificate—Reparation

Where respondent exercised dominion and control over five shipments of produce thereby accepting them, but failed to prove any price reduction except for the last shipment, respondent is liable to complainant for the full contract prices of four shipments less the amounts already paid

*Edward M. Silverstein*, Presiding Officer.  
Complainant and respondent, *pro se*.

*Decision by Donald A. Campbell, Judicial Officer.*

## DECISION AND ORDER

## PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$8,047.50 in connection with 5 shipments of cucumbers and green beans in interstate commerce.

A copy of the Department's report of investigation was served on each of the parties. Also, respondent was served with a copy of the formal complaint and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Under this procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to submit further evidence by way of verified statements. Complainant filed a opening statement, respondent an answering statement, and complainant a statement in reply. Neither party filed a brief.

## FINDINGS OF FACT

1. Complainant, M. J. Duer & Company, is a corporation whose mailing address is P.O. Box 606, Exmore, Virginia 23350.

2. Respondent, Chandler-Topic Co., Inc., is a corporation whose mailing address is 5905 Goldenrod Lane, Suite 220, Plymouth, Minnesota 55442. At all material times, respondent was licensed under the Act.

3. On or about May 7, 1981, respondent purchased 225 bushels of cucumbers from complainant at an f.o.b. price of \$10.50 per bushel, for a total invoice price of \$2,362.50. Although the respondent received and accepted the cucumbers, it has paid complainant only \$2,187.50 with respect to this shipment.

4. On or about July 31, 1981, respondent purchased the following from complainant at the noted f.o.b. prices: 700 bushels Super Select cucumbers at \$13.00 f.o.b. per bushel (\$9,100); 300 cartons of cucumbers at \$4.50 per carton f.o.b. (\$1,350); and 185 hampers of green beans at \$7.00 per hamper (\$1,295), for a total f.o.b. price of \$11,745.00. Although respondent received and accepted the shipment, it has paid complainant only \$10,102.50 with respect to it.

5. On or about July 8, 1981, respondent purchased 800 cartons of cucumbers at \$2.75 f.o.b. per carton (\$2,200) and 470 bushels of Super cucumbers at \$8.00 f.o.b. per bushel (\$3,760), for a total f.o.b. price of

\$5,960. Although the shipment was received and accepted by respondent, it has paid complainant only \$3,680 with respect to it.

6. On or about July 8, 1981, respondent purchased 500 bushels of Super cucumbers at \$8.00 f.o.b. per bushel (\$4,000) and 5 hampers of green beans at \$6.00 f.o.b. per hamper (\$30), for a total f.o.b. price of \$4,030.00. Although respondent received and accepted the cucumbers and green beans, it has paid the complainant only \$1,430.00

7. On or about July 15, 1981, respondent purchased 600 cartons of cucumbers at a delivered price of \$2.50 per carton for a total price of \$1,500.00. Respondent has paid complainant \$150.00 with respect to this shipment.

8. On July 13, 1981 respondent caused a federal inspection to be done on 175 cartons of cucumbers marked "Lion Brand, M. J. Duer & Co., Inc. Exmore Va 23350 Produce of U.S.A." The inspection was done at the Kasota Street Market, Minneapolis, Minnesota, at 11:30 a.m. Inspection certificate No. E085418 reflects in pertinent part, the following:

Condition of Load:	Partly unloaded. Remainder lengthwise and crosswise 1 to 5 layers 4 to 6 rows. Load extends to about 12 feet from front of trailer.
Condition of Pack:	Well filled
Temperature of Product	About 12 feet from front, bottom 28°, top 38°, 3d layer 42°F
★ ★ ★ ★ ★ ★ ★	
Condition	Mostly fresh and firm From 3 to 18%, average 8% damage by soft and shriveled ends In most samples 9 to 24%, in some none, average 12% damage including, 3% serious damage by yellowing Decay in most samples 6 to 9%, in many none, average 5% Black Rot and Bacterial Soft Rot in early to well developed stages
Remarks	This inspection and certificate is restricted to the above described lot only Trailer also contains Snap Beans and Peppers.

9. On July 17, 1981, a federal inspection took place at Spizman Fruit Co., St. Paul, Minnesota on 135 cartons of green peppers and 50 cartons of cucumbers. The cucumbers were marked "Lion Brand, 24 cucumbers. M. J. Duer & Co., Inc., Exmore, Va. Produce of U.S.A." Inspection certificate No. E085463, in pertinent part, reflects the following:

Condition of Load	Stacked on pallets at above location.
Condition of Pack:	* * * Cucumbers: tight

Temperature of Product	In various cartons 54° to 62°F.
Condition	* * * Cucumbers; Mostly fresh and firm. Average 3% serious damage by yellowing In most samples 13 to 75%, in some none, average 35% damage by soft ends Average 1% decay.

10. A informal complaint was filed on February 16, 1982, which was within nine months of when the cause of action stated herein accrued.

### CONCLUSIONS

The first issue which must be decided is whether respondent accepted any or all of the five shipments involved herein. We find that it did accept all of them because it appears that, in each instance, it exercised dominion and control over the produce. See *James Macchiaroli Fruit Co. v. Oasis Gardens, Inc.*, 34 Agric. Dec. 390 (1975) (Buyer exercised dominion by diverting shipment); *Bilroy's Farm v. Ruby Produce*, 30 Agric. Dec. 1004 (1971) (Buyer exercised dominion by unloading shipment from truck prior to inspection); *Quality Melon Sales v. Savioli*, 34 Agric. Dec. 517 (1975) (Buyer exercised dominion by failure to give timely notice of rejection). Having accepted each of the five loads, respondent is obligated to complainant for the full contract prices thereof less provable damages, adjustments agreed to between the parties, and monies paid. With these factors in mind, we need deal with each of the five shipments.

As to the first shipment, on May 7, 1981, respondent disputes the price claimed by complainant of \$10.50 per bushel. In support thereof it only offers an invoice on which it has made numerous written entries. We do not find this proof convincing. Complainant submits its original corrected invoice as proof. Respondent admits receiving it and does not allege that it made a timely protest of its entries. It is found, therefore, that respondent owes complainant \$175.00 for this shipment (the contract price of \$2,362.50 less payment of \$2,187.50).

As to the July 3, 1981, shipment respondent claims price adjustments on each of the 3 items involved. Complainant denies granting any adjustments. The only proof submitted by respondent is a "Brokers Standard Memorandum of Sale" issued by it noting these adjustments. Since complainant denies agreeing to these adjustments, since respondent, and not a third party, issued the "Brokers \* \* \* Memorandum", and since there is no proof that complainant was ever sent or received said Memorandum, we find respondent's proof unconvincing. It is therefore found that respondent owes complainant \$1,642.50 for this shipment (the contract price of \$11,745.00 less payment of \$10,102.50).

With regard to the first July 8, 1981, shipment—involving 800 cartons of cucumbers and 470 bushels of super cucumbers—respondent sub-

mits that there were condition problems on arrival and that complainant agreed that it might handle the load on consignment. In support of this assertion, respondent submits a "Brokers Memorandum of Sale" issued by it without proof, or even assertion, that said "Memorandum" was sent or received by complainant. It also submits statements by 3 of its customers asserting that they received damaged cucumbers. However, these statements do not clearly relate to this shipment. Moreover, complainant denies agreeing to such terms. In view of the above, we do not find respondent's proof convincing and hold that it owes complainant \$2,280.00 with regard to this shipment (the contract price of \$5,960.00 less payment of \$3,680.00).

In support of its claim that it was damaged by a breach of contract committed with regard to the second July 8, 1981, shipment, respondent submits a July 13, 1981, inspection certificate. We find this evidence unconvincing because the inspection reflected by the certificate took place 5 days after shipment of the produce which is a far longer time than normal transport would take, because the certificate reflects that the truck contained peppers as well as cucumbers when complainant did not ship peppers, and because "50 cartons" of "large" cucumbers were inspected when complainant shipped and respondent admits receiving "500 bushels" of "super" cucumbers. We find, therefore, that respondent owes complainant the contract price (\$4,030.00) less payment of \$1,430.00, or \$2,600, for this shipment.

With regard to the last shipment, sent July 15, 1981, of 600 cartons of cucumbers complainant admits that it agreed to a reduction in price of 25¢ per carton based on a reported federal inspection. Since the certificate of inspection in the record supports the parties' statements even though it does not clearly relate to these 600 cartons of cucumbers, we hold that the parties agreed to a reduction in price for this shipment. Since respondent has already paid complainant the agreed \$150.00 contract price, it owes complainant nothing further on this shipment.

We find, therefore, that respondent's failure to pay complainant the amount of \$6,697.50 (\$175 plus \$1,642.50 plus \$2,280 plus \$2,600) is a violation of section 2 of the Act for which reparation plus interest should be awarded.

#### ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$6,697.50, with interest thereon at the rate of 13% per annum from August 1, 1981, until paid.

Copies of this order shall be served on the parties.

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(No. 22,351)

STEPHEN PAVICH & SONS *v.* M & S DISTRIBUTING COMPANY. PACA  
Docket No. 2-6047. Decided February 23, 1983.

Broker's memorandum of sale—Bill of lading, not determinative—Liable  
for full purchase price

Where respondent buyer failed to prove it purchased a shipment of table grapes from the  
broker or that the broker was authorized by complainant seller to receive payment,  
respondent is liable for the full purchase price of the subject grapes

*George S. Whitten*, Presiding Officer  
Complainant and respondent, *pro se*.

*Decision by Donald A. Campbell, Judicial Officer.*

### DECISION AND ORDER

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,313.00 in connection with the shipment in interstate commerce of a partial truckload of table grapes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$15,000.00 and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

#### FINDINGS OF FACT

1. Complainant is a partnership composed of Stephen Pavich, Sr., Helen Rose Pavich, Stephen Paul Pavich, and Thomas Daniel Pavich, doing business as Stephen Pavich & Sons, whose address is Route 2, P.O. Box 291, Delano, California.

2. Respondent is a partnership composed of Margaret H. and Serrell S. Wagner, Jr., doing business as M & S Distributing Company, whose

address is P.O. Box 2723, Harrisburg, Pennsylvania. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 19, 1981, complainant sold to respondent 180 boxes of U.S. No. 1 California table grapes, Thompson Seedless, Normandy label, at \$12.15 per box, plus 70 cents per box for the precooling and palletizing, for a total f.o.b. price of \$2,313.00.

4. Two brokers acted as intermediaries between complainant and respondent: West Coast Connection, of Fresno, California; and Western Mixt Produce Co. of Salinas, California.

5. Complainant shipped the 180 boxes of table grapes on September 19, 1981, and billed them on the bill of lading to Western Mixt Produce Co., Harrisburg, Pennsylvania.

6. The table grapes were delivered by the carrier to respondent in Harrisburg, Pennsylvania and accepted by respondent.

7. Respondent was invoiced for the table grapes in the amount of \$2,313.00, plus \$27.00 brokerage, by Western Mixt Produce Company, on an invoice dated September 21, 1981. Respondent paid Western Mixt Produce Company in the full amount of \$2,340.00 by check dated September 30, 1981.

8. Complainant has not been paid any amount for the subject table grapes.

9. The formal complaint was filed on April 15, 1982, which was within 9 months after the cause of action herein accrued.

#### CONCLUSIONS

Complainant alleges in the formal complaint that it sold the 180 boxes of table grapes to complainant for a total price of \$2,313.00, f.o.b., and that the contract was negotiated by a broker, West Coast Connection, of Fresno, California. Respondent in its sworn answer admits both the sale and the negotiation of the contract by West Coast Connection.

As a defense to complainant's action respondent alleges that the bill of lading shows that the grapes were billed to Western Mixt Produce in Harrisburg, Pennsylvania and that since respondent never received an invoice from complainant, but did receive an invoice from Western Mixt Produce for the agreed purchase price of the grapes, plus \$27.00 brokerage, respondent was warranted in paying Western Mixt Produce for the Grapes.

Respondent's allegation that it did not receive an invoice from complainant is not rebutted by complainant in the record. In addition, the copy of complainant's invoice attached to the complaint, while showing respondent as the recipient is dated November 3, 1981, or some 45 days after the date on which the grapes were shipped. If there were nothing more in the record respondent would have a very strong case. However,



the record also contains, in the Department's report of investigation, a copy of a broker's memorandum of sale issued by West Coast Connection. This memorandum is dated September 19, 1981, and shows respondent as buyer and complainant as seller. In addition, there is a March 6, 1982, letter in the report of investigation from West Coast Connection which states, in relevant part, as follows:

On September 19, 1981 we were discussing via phone with Mr. Pete Emberton of Western Mixt Produce Co, Salinas, California the fact that we were looking for a couple of pallets of thompson [sic] seedless grapes for our customer in Harrisburg, Pa. Mr. Emberton stated that he had been selling the Normandy label of Stephan Pavich & Sons and that he could get some for us to finish our truck. After discussing the quality, price and condition with our customer, we instructed him to have Stephen Pavich & Sons ship two pallets of ninety lugs each to M. & S. Distributing Co., Harrisburg, Pa. via an A.T.F. truck on September 19, 1981. Our phone agreement was to confirm this via written confirmation from ourselves to the customer and the shipper with a copy of same to Western Mixt Produce. Further, it was our instructions to have the shipper bill M. & S. Dist. on the basis of \$12.15 FOB plus .70 for palletizing and pre-cooling.

We did this and billed Western Mixt Produce on the basis of 15¢ per package brokerage which amounted to a total of \$27.00.

Western Mixt Produce paid us \$27.00 by check which was received and posted by us on November 9, 1981. It is our understanding that Western Mixt was to receive their brokerage from Stephan [sic] Pavich & Sons.

Respondent nowhere denies receiving the broker's memorandum of sale sent by West Coast Connection showing complainant as seller. This fact, together with respondent's admission in its answer that it negotiated a contract through West Coast Connection with complainant for the purchase of the 180 boxes of table grapes demonstrates that respondent had ample notice of the complainant's interest in the grapes. The fact that grapes were billed to Western Mixt Produce on the bill of lading is not determinative. The Uniform Commercial Code, Section 7-303 provides in relevant part as follows:

(1) Unless the bill of lading otherwise provides, the carrier may delivery the goods to a person or destination other than that stated in the bill or may otherwise dispose of the goods on instructions from

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(c) The consignee on a non-negotiable bill in the absence of contrary instructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill;

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We are aware, of course, that the non-negotiable bill of lading in this case would fall under the Federal Bills of Lading Act of 1916, 49 USC §§81-124 (1970). However, we are aware of nothing in that Act which is inherently inconsistent with the provisions of the UCC quoted above. The point for our consideration here is that the consignee of a non-negotiable bill of lading is not necessarily the person ultimately entitled to possession of the goods. The presence of Western Mixt Produce's name on the bill of lading as consignee is not conclusive proof that the goods were sold to Western Mixt Produce. Neither does the receipt of an invoice from Western Mixt Produce prove that Western Mixt Produce purchased the grapes from complainant.

In summary, it was incumbent upon respondent to prove either that Western Mixt Produce had title to the grapes and that respondent purchased such grapes from Western Mixt Produce or that Western Mixt Produce was authorized by complainant to receive payment for the grapes. Respondent has not proven either of these propositions by preponderance of the evidence. See *Adam v. Perna*, 31 A.D. 431 (1972) and *Alexander Marketing v Gram & Sons, et. al.*, 30 A.D. 439 (1971) We find that respondent is liable to complainant for the full purchase price of the subject grapes of \$2,313.00 Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

#### ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$2,313.00, with interest thereon at the rate of 13% per annum from October 1, 1981, until paid.

Copies of this order shall be served upon the parties

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NORWOOD E. TEAL *v.* TONY PAGANO & SONS, INC    PACA Docket No.  
2-5998.    Decided February 23, 1983.

**Bona fide dispute—Accord and satisfaction—Jurisdiction under the Act,  
failure to prove—Dismissal of complaint and counterclaim**

Where an accord and satisfaction was established due to complainant's endorsement of respondent's check, the complaint is dismissed. Since respondent failed to prove complainant was operating subject to the Act, the counterclaim is dismissed.

*Andrew Y. Stanton*, Presiding Officer

*Moran McLendon, Jr.*, Wadesboro, N C., for complainant.

*H. Joseph Kornfeld*, Brooklyn, N Y, for respondent

*Decision by Donald A. Campbell, Judicial Officer.*

**DECISION AND ORDER**

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$12,464.50 in connection with the sale of numerous truckloads of watermelons in interstate commerce.

A copy of the report of investigation by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, who filed an answer thereto, denying liability to complainant. Respondent also filed a counterclaim in the amount of \$2,594 plus interest in connection with the allegations of the complaint. Complainant filed a reply to the counterclaim, denying liability.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, respondent filed an answering statement and complainant filed a statement in reply. Neither party filed a brief.

**FINDINGS OF FACT**

1. Complainant, Norwood E. Teal, is an individual whose address is Route #3, Wadesboro, North Carolina. At the time of the transactions alleged in the counterclaim, complainant was neither licensed nor subject to license under the Act.

2. Respondent, Tony Pagano & Sons, Inc., is a corporation, whose address is 62 Brooklyn Terminal Market, Brooklyn, New York. At the time

of the transactions involved in the complaint, respondent was licensed under the Act.

3. From approximately July 7, 1981, through July 15, 1981, complainant either sold or consigned to respondent, by oral contract, 13 loads of watermelons.

4 The watermelons were transported, in interstate commerce, from complainant's place of business to that of respondent.

5. Sometime in July 1981, respondent advanced to complainant the sum of \$5,000, to be applied toward the purchase price of the watermelons.

6. According to a letter written by respondent's counsel, Moran D. McLendon, to the Department's Jack D. Flanagan, dated September 4, 1981, and received on October 14, 1981, complainant located respondent's Mr. Pagano about ten days after the last shipment of watermelons, approximately July 15, 1981, and requested payment. Pagano asked for a few days within which to make such payment. McLendon states that Pagano "then stated that he owed Mr. Teal only \$2,300 but . . . [respondent's] . . . employee 'Joey' called back later saying that they had made a mistake and it was \$4,800."

7. Respondent sent a check to complainant, dated August 13, 1981, in the amount of \$4,846.31. On the check was printed the following: "By endorsement this check when paid is accepted in full payment of the following account." Beneath that statement, the following was handwritten: "Bal. of melons paid in full." The date "8/13/81" and the amount "\$4,846.31" were also handwritten beneath the printed statement on the check. Complainant endorsed the check and deposited it into his account on August 20, 1981.

8 A formal complaint was filed on December 18, 1981, which was within nine months from the time the alleged cause of action herein accrued

9. A counterclaim involving matters alleged in the complaint was timely filed on March 30, 1982

### CONCLUSIONS

Complainant alleges that respondent has made only partial payment for 13 loads of watermelons respondent purchased for \$22,264.50, and that respondent now owes \$12,464.50. Respondent denies that it purchases the watermelons outright, asserting that the agreement with complainant was that respondent would sell the watermelons on complainant's behalf and collect a commission. Respondent claims that its two payments to complainant, a \$5,000 advance and, subsequently, a check for \$4,846.31, were all that respondent owes pursuant to its contract with complainant. Complainant admits that it has received and ac-

cepted these payments, but claims that an additional \$12,484 is owed pursuant to its contract of purchase and sale with respondent.

We need not discuss the nature of the agreement between the parties herein, as it is clear that an accord and satisfaction took place in full respondent of any further liability.

An accord and satisfaction occurs when there is a bona fide dispute between the parties as to an amount due, and there is a tender or payment of the disputed amount. The payment must be accompanied by a receipt and declarations as amount to a condition that such payment, once accepted, is accepted in full satisfaction. Upon the acceptance of the payment, an accord and satisfaction occurs. *Six L's Produce, Inc. v. Preciosa Packing House Inc.*, 41 A.D. 1233 (1982), *Kaplan & Sons Produce Co., Inc. v. Michael J. Navilio, Inc.*, 33 A.D. 1614 (1981).

There was a bona fide dispute in the present case. According to respondent's counsel, Moran D. McLendon, complainant was told by respondent's employee, Joey, that respondent's position was that respondent owed complainant only \$4,800. This conversation occurred approximately two weeks after delivery of the last shipment of watermelons, July 15, 1981, or on about July 29, 1981 (see Finding of Fact 6). Therefore, at the time complainant endorsed and deposited respondent's check, August 13, 1981, check for \$4,846.31 on August 20, 1981 (Finding of Fact 7), complainant knew that respondent disputed complainant's claim of what was owing and considered itself liable for only the amount of the check.

It is apparent from the language on the check that acceptance of the check by complainant would constitute full satisfaction of respondent's debt. The check contains two statements, one in print and the other handwritten, expressing that the check is being offered in full payment for the disputed transactions (Finding of Fact 7). Complainant claims that the check was deposited erroneously by complainant's wife, while complainant was ill. However, complainant had not presented any evidence to support this claim and, further, such claim conflicts with the fact that the check is clearly endorsed with complainant's signature. Therefore, we conclude that an accord and satisfaction took place. Accordingly, complainant must be dismissed.

Respondent has filed a counterclaim for \$2,594 plus interest and commission, based on its alleged agreement with complainant concerning the 13 loads of watermelons that are the subject of the complaint. However, reparation proceedings may only be brought against those persons licensed or subject to license under the Act as commission merchant, dealers or brokers (7 U.S.C. 499f (a)), which categories are defined in 7 U.S.C. 499a (5), (6), and (7) respectively. The Department's investigation states that complainant is not licensed under the Act.

spondent has failed to allege that, at the time of the transactions involved in the counterclaim, complainant was either licensed or acting subject to license under the Act. Therefore, we conclude that respondent has failed to prove that complainant was operating subject to the jurisdiction of the Act. Hence, the counterclaim must be dismissed. *Warren Fairbrother v. Gulf Farms, Inc.*, 28 A.D. 612 (1969).

#### ORDER

The complaint and counterclaim are hereby dismissed.  
Copies of this order shall be served upon the parties.

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#### MISCELLANEOUS ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,353)

PRODUCE ASSOCIATES INC. *v.* NEW LINDEN PRICE RITE INC. PACA  
Docket No. 2-6154. Order issued February 14, 1983.

#### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,254.50 in connection with a transaction in interstate commerce involving the sale and shipment of perishable agricultural commodities.

A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also moved to dismiss the action, alleging that the claim which is the subject of this proceeding had been brought by complainant in the Superior Court of New Jersey, and that such claim had been dismissed with prejudice pursuant to an agreement between the parties dated August 11, 1982.

Section 5 (d) of the Act states, with respect to the liability of a commission merchant, dealer or broker for the violation of any provision of section 2 of the Act, as follows:

(d) Such liability may be enforced either (1) by complaint to the Secretary hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

This section has been construed to mean that a complaint for reparation may not be brought before the Secretary of Agriculture if the complainant has elected to pursue such claim in another court *Symms Fruit Ranch, Inc., v. Arizona Fresh Foods, Inc.*, 41 A.D. 351 (1982); *Southland Produce Co., v. R. Belson Company*, 29 A.D. 614 (1970).

Complainant does not deny that its state court claim included the claim which it is asserting in this forum, but argues that it has not elected to pursue its state court claim, as it has secured a voluntary dismissal. Respondent asserts that the dismissal was intended to prevent the bringing of such claim before the Secretary as well, hence the dismissal was made "with prejudice". The record contains a letter from respondent's counsel to complainant's counsel dated August 11, 1982, which was apparently sent with the stipulation of dismissal. Complainant does not deny receiving such letter. The letter reads as follows, in pertinent part: "It is understood that we are resolving the entire matter by this method including any potential claims reflected pursuant to the Perishable Agricultural Commodities Act." A dismissal with prejudice was stipulated to by both parties and filed with the court.

It is apparent that both parties intended the dismissal of the state court case to bar the bringing of the same claim before the Secretary. Moreover, New Jersey law, which is applicable to this issue (*Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950)) provides that a dismissal with prejudice "constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial." *Gambocz v. Yelencsics*, 468 F.2d 837 (3rd Cir. 1972). New Jersey law also holds that a final judgment bars the plaintiff from relitigating the cause of action determined by such judgment. *Flood v. Besser Company*, 324 F.2d 500 (3rd Cir. 1963).

Therefore, we conclude that the dismissal with prejudice of plaintiff's action in state court serves to bar the institution of the instant reparation proceeding covering the same issues, in accordance with section 5 (d) of the Act. Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

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(No. 22,354)

PRODUCE ASSOCIATES INC. v. SHOP-RITE FOODARAMA OF LAURELTON  
INC. PACA Docket No. 2-6138. Order issued February 15, 1983.

#### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$950.00 in connection with a transaction in interstate commerce involving the sale and shipment of perishable agricultural commodities.

A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also moved to dismiss the action, alleging that the claim which is the subject of this proceeding had been brought by complainant in the Superior Court of New Jersey, and that such claim had been dismissed with prejudice pursuant to an agreement between the parties dated August 11, 1982. The Department, in a letter dated November 9, 1982, gave complainant ten days in which to show cause why its complaint should not be dismissed. Complainant filed a response on November 22, 1982, and respondent filed on November 29, 1982, a letter replying to complainant's response.

Section 5 (d) of the Act states, with respect to the liability of a commission merchant, dealer or broker for the violation of any provision of section 2 of the Act, as follows:

(d) Such liability may be enforced either (1) by complainant to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies

This section has been construed to mean that a complaint for reparation may not be brought before the Secretary of Agriculture if the complainant has elected to pursue such claim in another court *Symms Fruit Ranch, Inc., v. Arizona Fresh Foods, Inc.*, 41 A.D. 351 (1982); *Southland Produce Co., v. R. Belson Company*, 29 A D 614 (1970).

Complainant does not deny that its state court claim included the claim which it is asserting in the forum, but argues that it has not elected to pursue its state court claim, as it has secured a voluntary dismissal. Respondent asserts that the dismissal was intended to prevent the bringing of such claim before the Secretary as well, hence the dismissal was made "with prejudice". The record contains a letter from re-



spondent's counsel to complainant's counsel dated August 11, 1982, which was apparently sent with the stipulation of dismissal. Complainant does not deny receiving such letter. The letter reads as follows, in pertinent part: "It is understood that we are resolving the entire matter by this method including any potential claims reflected pursuant to the Perishable Agricultural Commodities Act." A dismissal with prejudice was stipulated to by both parties and filed with the court.

It is apparent that both parties intended the dismissal of the state court case to bar the bringing of the same claim before the Secretary. Moreover, New Jersey law, which is applicable to this issue (*Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950)) provides that a dismissal with prejudice "constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial." *Gambocz v. Yelencsics*, 468 F.2d 837 (3rd Cir. 1972). New Jersey law also holds that a final judgment bars the plaintiff from relitigating the cause of action determined by such judgment. *Flood v. Besser Company*, 324 F.2d 500 (3rd Cir. 1963).

Therefore, we conclude that the dismissal with prejudice of plaintiff's action in state court serves to bar the institution of the instant reparation proceeding covering the same issues, in accordance with section 5(d) of the Act. Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

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(No. 22,355)

PRODUCE ASSOCIATES INC. v. SHOP WISE SUPERMARKETS OF CONNECTICUT INC. PACA Docket No. 2-6139. Order issued February 15, 1983.

#### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$25,185.50 in connection with a transaction in interstate commerce involving the sale and shipment of perishable agricultural commodities.

A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability. Respondent also moved to dismiss the action, alleging that the claim which is the subject of this proceeding had been brought by complainant in the Superior Court of New

Jersey, and that such claim had been dismissed with prejudice pursuant to an agreement between the parties dated August 11, 1982.

Section 5 (d) of the Act states, with respect to the liability of a commission merchant, dealer or broker for the violation of any provision of section 2 of the Act, as follows:

(d) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

This section has been construed to mean that a complaint for reparation may not be brought before the Secretary of Agriculture if the complainant has elected to pursue such claim in another court *Symms Fruit Ranch, Inc. v. Arizona Fresh Foods, Inc.*, 41 A.D. 351 (1982); *Southland Produce Co., v. R. Belson Company*, 29 A.D. 614 (1970).

Complainant does not deny that its state court claim included the claim which it is asserting in this forum, but argues that it has not elected to pursue its state court claim, as it has secured a voluntary dismissal. Respondent asserts that the dismissal was intended to prevent the bringing of such claim before the Secretary as well, hence the dismissal was made "with prejudice". The record contains a letter from respondent's counsel to complainant's counsel dated August 11, 1982, which was apparently sent with the stipulation of dismissal. Complainant does not deny receiving such letter. The letter reads as follows, in pertinent part: "It is understood that we are resolving the entire matter by this method including any potential claims reflected pursuant to the Perishable Agricultural Commodities Act." A dismissal with prejudice was stipulated to by both parties and filed with the court.

It is apparent that both parties intended the dismissal of the state court case to bar the bringing of the same claim before the Secretary. Moreover, New Jersey law, which is applicable to this issue (*Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3rd Cir. 1950)) provides that a dismissal with prejudice "constitutes and adjudication of the merits as fully and completely as if the order had been entered after trial." *Gambocz v. Yelencsics*, 468 F.2d 837 (3rd Cir. 1972). New Jersey law also holds that a final judgment bars the plaintiff from relitigating the cause of action determined by such judgment. *Flood v. Besser Company*, 324 F.2d 500 (3rd Cir. 1963).

Therefore, we conclude that the dismissal with prejudice of plaintiff's action in state court serves to bar the institution of the instant repara-

tion proceeding covering the same issues, in accordance with section 5 (d) of the Act. Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

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ORDER REQUIRING PAYMENT  
OF UNDISPUTED AMOUNT

(No. 22,356)

THE WHOLESALE PRODUCE INDUSTRY OF PITTSBURGH *v.* GARDEN FRESH  
MARKETS INC. PACA Docket No. 2-6192. Order issued Feb-  
ruary 9, 1983. Respondent shall pay complainant as an undisputed  
amount, \$3,391.69 within 30 days from the date of this order with  
13 percent interest from July 1, 1982, until paid.

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ORDERS OF DISMISSAL

(No. 22,357)

FLORIZA SALES CO., INC. *v.* TOMATOES, INC. PACA Docket No.  
2-5957. Order issued February 14, 1983. Complainant author-  
ized dismissal of complaint.

(No. 22,358)

RITCLO PRODUCE, INC. *v.* CUMBERLAND PRODUCE CO., INC. PACA  
Docket No. 2-6099. Order issued February 9, 1983. Complain-  
ant authorized dismissal of complaint.

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REPARATION DEFAULT DECISIONS--(RD) ISSUED BY  
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,359)

WILSON BROTHERS & JONES *v.* J.G.S. PRODUCE CORP. PACA Docket No. RD-83-131. Reparation of \$18,208.73 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued February 1, 1983.

(No. 22,360)

COCOLA FRUIT CORPORATION *v.* FRESH SQUEEZE DAILY INC. PACA Docket No. RD-83-132. Reparation of \$3,172.50 with 13 percent interest from August 1, 1981, awarded complainant against respondent in order issued February 1, 1983.

(No. 22,361)

GLEN HARVEY & SON INC. *v.* D. L. FOOD PURVEYORS INC. a/t/a MDM FOODS. PACA Docket No. RD-83-133. Reparation of \$7,762.00 with 13 percent interest from September 1, 1982, awarded complainant against respondent in order issued February 1, 1983.

(No. 22,362)

DOMINIC CULOTTA *v.* W.P.C. INSTITUTIONAL SUPPLY, INC. PACA Docket No. RD-83-134. Reparation of \$1,952.25 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued February 1, 1983.

(No. 22,363)

RAIMOND & RAIMOND, INC. *v.* DAVID LOZANO and JUAN I. VASQUEZ, JR. d/b/a DAVID'S PRODUCE PACA Docket No. RD-83-135. Reparation of \$27,811.74 with 13 percent interest from September 1, 1981, awarded complainant against respondent in order issued February 1, 1983.

(No. 22,364)

GENBROKER CORPORATION a/t/a GENERAL BROKERAGE CO. *v.* HAVANA POTATOES CORP. PACA Docket No. RD-83-136. Reparation of \$2,875.00 with 13 percent interest from June 1, 1982, awarded complainant against respondent in order issued February 2, 1983.

(No. 22,365)

PHELAN & TAYLOR PRODUCE COMPANY INC. v. JOSEPH RUBINO d/b/a SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-137. Reparation of \$7,004 70 with 13 percent interest from September 1, 1982, awarded complainant against respondent in order issued February 2, 1983.

(No. 22,366)

SUN WORLD INTERNATIONAL, INC. v. MONTE BROKERAGE CO. PACA Docket No. RD-83-138. Reparation of \$17,909.55 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued February 2, 1983.

(No. 22,367)

WEST COAST PRODUCE SALES, INC. v. WEST COAST CONNECTION. PACA Docket No. RD-83-139. Reparation of \$10,165.00 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued February 2, 1983.

(No. 22,368)

GRAINGER FARMS, INC. a/t/a ECKEL PRODUCE COMPANY v. JOHN INIGARIDA d/b/a CAL-PACIFIC PRODUCE CO. PACA Docket No. RD-83-140. Reparation of \$1,660.00 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued February 2, 1983

(No. 22,369)

PARAMOUNT CITRUS ASSOCIATION, INC. v. JOSEPH RUBINO d/b/a SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-141. Reparation of \$4,498.75 with 13 percent interest from June 1, 1982, awarded complainant against respondent in order issued February 10, 1983.

(No. 22,370)

ACE HI PACKING INC. v. ONION SALES INC. PACA Docket No. RD-83-142. Reparation of \$28,908.00 with 13 percent interest from April 1, 1982, awarded complainant against respondent in order issued February 10, 1983.

(No. 22,371)

CASHMERE PIONEER GROWERS *v.* LIMEX INTERNATIONAL OF CALIF., INC. PACA Docket No. RD-83-143. Reparation of \$297,984.00 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued February 10, 1983.

(No. 22,372)

GRIFFIN & BRAND SALES AGENCY INC *v.* UNION SALES INC. PACA Docket No. RD-83-144. Reparation of \$182,528.35 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued February 10, 1983.

(No. 22,373)

HINES & COMPANY *v.* IRISH PRODUCE CO. PACA Docket No. RD-83-145. Reparation of \$30,875.00 with 13 percent interest from December 1, 1981, awarded complainant against respondent in order issued February 11, 1983.

(No. 22,374)

NEW YORK PRODUCE TRADE ASSOCIATION INC. *v.* ARISTA PRODUCE CORP. PACA Docket No. RD-83-147. Reparation of \$12,853.68 with 13 percent interest from May 1, 1982, awarded complainant against respondent in order issued February 11, 1983.

(No. 22,375)

M LEVIN & CO INC *v.* TED DUBOIS ASSOC. CO PACA Docket No. RD-83-148. Reparation of \$6,209.00 with 13 percent interest from May 1, 1982, awarded complainant against respondent in order issued February 11, 1983.

(No. 22,376)

TOM MOORE CO INC. *v.* AMIGOMEX INC PACA Docket No. RD-83-149. Reparation of \$7,965.00 with 13 percent interest from February 1, 1982, awarded complainant against respondent in order issued February 11, 1983.

(No. 22,377)

BEN B. SCHWARTZ & SONS INC. *v.* COMMERCIAL BUYING AGENCY INC. PACA Docket No. RD-83-150. Reparation of \$13,181.00 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued February 11, 1983.

(No. 22,378)

HOMESTEAD TOMATO PACKING CO. INC. *v.* TRIPLE A TOMATO INC  
PACA Docket No. RD-83-151. Reparation of \$902.50 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued February 24, 1983.

(No. 22,379)

RUDY HOLTHOUSE SONS *a/t/a* HOLTHOUSE FARMS *v.* D L. FOOD PURVEYORS INC. *a/t/a* MDM FOODS PACA Docket No. RD-83-153. Reparation of \$2,617.00 with 13 percent interest from December 1, 1981, awarded complainant against respondent in order issued February 24, 1983.

(No. 22,380)

MEYER TOMATOES *v.* GATEWAY PRODUCE CO. PACA Docket No. RD-83-154. Reparation of \$9,102.00 with 13 percent interest from September 1, 1982, awarded complainant against respondent in order issued February 24, 1983.

(No. 22,381)

DOVE MUSHROOMS, INC. *v.* D. L. FOOD PURVEYORS INC. *a/t/a* MDM FOODS. PACA Docket No. RD-83-155. Reparation of \$27,576.25 with 13 percent interest from June 1, 1982, awarded complainant against respondent in order issued February 24, 1983.

(No. 22,382)

MARTIN PRODUCE CO. INC. *v.* P. DOVER PRODUCE. PACA Docket No. RD-83-156. Reparation of \$1,750.00 with 13 percent interest from September 1, 1982, awarded complainant against respondent in order issued February 24, 1983.

(No. 22,383)

BYRD PRODUCE COMPANY *v.* ASSOCIATED GROCERS OF NEBR. COOP., INC. PACA Docket No. RD-83-157. Reparation of \$921.60 with 13 percent interest from November 1, 1981, awarded complainant against respondent in order issued February 25, 1983.

(No. 22,384)

PACIFIC FARM COMPANY *v.* AMERI-CAL PRODUCE INC. PACA Docket No. RD-83-158. Reparation of \$1,592.00 with 13 percent interest from December 1, 1981, awarded complainant against respondent in order issued February 25, 1983.

(No. 22,385)

STARR PRODUCE CO. INC. *v.* CUMBERLAND PRODUCE CO. INC. PACA Docket No. RD-83-159. Reparation of \$5,780.50 with 13 percent interest from July 1, 1982, awarded complainant against respondent in order issued February 25, 1983.

(No. 22,386)

TANITA FARMS, INC. *v.* D. L. FOOD PURVEYORS INC. *a/t/a* MDM FOODS. PACA Docket No. RD-83-160. Reparation of \$15,008.25 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued February 25, 1983.

(No. 22,387)

LORAN D. SHEPPARD *d/b/a* GUY PACKING COMPANY *v.* KENNETH M. CAPPS *d/b/a* KENNETH CAPPS PRODUCE. PACA Docket No. RD-83-162. Reparation of \$2,224.25 with 13 percent interest from March 1, 1982, awarded complainant against respondent in order issued February 25, 1983.

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(No. 22,389)

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KENT W. NORTHCROSS d/b/a NORTHCROSS DISTRIBUTING *v.* SA-SO POULTRY SALES CO. INC. PACA Docket No. RD-83-164. Reparation of \$45,731.80 with 13 percent interest from August 1, 1982, awarded complainant against respondent in order issued February 28, 1983.

(No. 22,391)

THE KATZ COMPANY INC. *v.* COMMERCIAL BUYING AGENCY. PACA Docket No. RD-83-165. Reparation of \$24,338.00 with 13 percent interest from April 1, 1982, awarded complainant against respondent in order issued February 28, 1983.

(No. 22,392)

DEW-GRO, INC. a/t/a CENTRAL WEST PRODUCE *v.* JOSEPH RUBINO d/b/a SUN-GLO WHOLESALE FRUIT & PRODUCE. PACA Docket No. RD-83-166. Reparation of \$9,000.65 with 13 percent interest from October 1, 1982, awarded complainant against respondent in order issued February 28, 1983.

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MISCELLANEOUS REPARATION DEFAULT—(RD) ORDERS ISSUED BY  
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,393)

DANNY G. LOPEZ d/b/a LOPEZ PRODUCE *v.* JOHN E. REYNA d/b/a REYNA BROTHERS PRODUCE AND TRUCKING. PACA Docket No. RD-83-120. Order issued February 9, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. 499a *et seq.*, a Default Order was issued on January 17, 1983, requiring respondent to pay complainant \$9,431.75, with interest thereon from February 1, 1982. By letter dated January 12, 1983, and received by the Department on January 25, 1983, the respondent has moved for a stay to give him time to file an answer. The rules of practice however do not permit the filing of an answer after default without the granting of a motion to set aside such default. See 7 CFR 47.25(e). Such a motion may not be granted unless the respondent provides good reason why the answer was not timely filed. In-

asmuch as the respondent should have the opportunity to file such a motion, the order of January 17, 1983, is stayed until further order shall issue.

The respondent shall file such a motion as is called for in 7 CFR 47.25 (e) within ten (10) days of service hereof. No extensions of time will be granted and failure to make a timely filing will result in the reissuance of a Default Order.

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ORDER OF DISMISSAL

(No. 22,394)

MURAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO v. DESCHUTES  
WHOLESALE PRODUCE. PACA Docket No. RD-83-146. Order  
issued February 23, 1983. Respondent tendered check to complainant in full settlement. Complainant authorized dismissal of complaint.

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